(16)

No. 06-6407 *** CAPITAL CASE ***

Title: Scott Louis Panetti, Petitioner

v.

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: September 12, 2006
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (04-70045)
Decision Date: May 9, 2006
Rehearing Denied: June 8, 2006
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Sep 6 2006 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 12, 2006) |
| Oct 17 2006 | Order extending time to file response to petition to and including November 13, 2006. |
| Nov 13 2006 | Brief amicus curiae of National Alliance for the Mentally Ill filed. |
| Nov 13 2006 | Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed. |
| Nov 30 2006 | DISTRIBUTED for Conference of January 5, 2007. |
| Dec 6 2006 | Reply of petitioner Scott Louis Panetti filed. (Distributed) |
| Jan 5 2007 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. |
| Jan 19 2007 | Motion to appoint counsel filed by petitioner Scott Louis Panetti. |
| Feb 5 2007 | SET FOR ARGUMENT ON Wednesday, April 18, 2007. |
| Feb 7 2007 | Motion DISTRIBUTED for Conference of February 23, 2007. |
| Feb 16 2007 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including February 22, 2007. |
| Feb 16 2007 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondent. |
| Feb 20 2007 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner. |
| Feb 21 2007 | Brief amicus curiae of American Bar Association filed. |
| Feb 21 2007 | Brief amici curiae of American Psychological Association, et al. filed. |
| Feb 22 2007 | Brief amicus curiae of Legal Historians filed. |
| Feb 22 2007 | Joint appendix filed. (Jt. appendix in two volumes. Vol.II oversize.) |
| Feb 22 2007 | Brief of petitioner Scott Louis Panetti filed. |
| Feb 26 2007 | Motion to appoint counsel filed by petitioner GRANTED. Keith S. Hampton, Esquire, of Austin, Texas is appointed to serve as counsel for the petitioner in this case. |
| Feb 26 2007 | Record received from U.S.C.A. for 5th Circuit. (1 envelope) |
| Mar 8 2007 | CIRCULATED. |
| Mar 12 2007 | Record received from U.S. D.C. for Western District of Texas. (1 box) |
| Mar 29 2007 | Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed) |
| Mar 29 2007 | Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed) |

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|---|---|
| Apr 2 2007 | The parties are directed to file supplemental briefs addressing the following question: Must petitioner's habeas application be dismissed as "second or successive" pursuant to 28 U.S.C. Sec. 2244? The briefs, not to exceed 15 pages, are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Wednesday, April 11, 2007. |
| Apr 9 2007 | Reply of petitioner Scott Louis Panetti filed. (Distributed) |
| Apr 11 2007 | Supplemental brief of petitioner Scott Louis Panetti filed. (Distributed) |
| Apr 11 2007 | Supplemental brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed) |
| Apr 18 2007 | Argued. For petitioner: Gregory W. Wiercioch, San Francisco, Cal. For respondent: R. Ted Cruz, Solicitor General, Austin, Tex |

10 9/6/07

No. 06-6407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

SCOTT LOUIS PANETTI,

Petitioner,

V.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**CAPITAL CASE**

## QUESTION PRESENTED

DOES THE EIGHTH AMENDMENT PERMIT THE EXECUTION OF A DEATH ROW INMATE WHO HAS A FACTUAL AWARENESS OF THE REASON FOR HIS EXECUTION BUT WHO, BECAUSE OF SEVERE MENTAL ILLNESS, HAS A DELUSIONAL BELIEF AS TO WHY THE STATE IS EXECUTING HIM, AND THUS DOES NOT APPRECIATE THAT HIS EXECUTION IS INTENDED TO SEEK RETRIBUTION FOR HIS CAPITAL CRIME?

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**October Term, 2005**

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**SCOTT LOUIS PANETTI,**

**Petitioner,**

**V.**

**NATHANIEL QUARTERMAN,**
**Director, Texas Department of Criminal Justice,**
**Correctional Institutions Division,**

**Respondent.**

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*PETITION FOR WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

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Petitioner Scott Louis Panetti asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), is attached to this petition as Appendix A. The memorandum opinion of the district court denying Mr. Panetti's competency-to-be-executed claim, *Panetti v. Dretke*, 401 F. Supp.2d 702 (W.D. Tex. 2004), is attached as Appendix B.

## JURISDICTION

The Court of Appeals entered its judgment on May 9, 2006. The Court of Appeals denied Mr. Panetti's timely petition for rehearing en banc on June 8, 2006. The order denying rehearing is attached as Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Panetti having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. This case involves the Fourteenth Amendment to the United States Constitution, which applies the Eighth Amendments to the states, and which provides, in relevant part, that "No state may deprive any person of life [or] liberty . . . without due process of law."

## STATEMENT OF THE CASE

While the issue in this case now focuses on competency to be executed, it is important for this Court to understand the severity of the mental illness that Mr. Panetti has experienced for 25 years and its manifestations at every stage of his criminal proceedings. There is no dispute that Mr.

Panetti is profoundly mentally ill; the dispute centers around the legal consequences of his mental illness. Although unorthodox, this lengthy Statement of Facts will provide context and assist the Court in assessing the question at the heart of this case: whether Mr. Panetti's psychotic thought processes affect his ability to appreciate the connection between his crime and his punishment.

A. Mr. Panetti's History of Mental Illness

In the decade leading up to the crime, Mr. Panetti was hospitalized 14 times in six different institutions for schizophrenia, manic depression (bipolar disorder), auditory hallucinations, and delusions of persecution and grandiosity.[1] He was involuntarily committed to the Kerrville (Texas) State Hospital in 1981. He was diagnosed as paranoid and hostile toward his family. In April 1986, he was admitted to the Starlite Village Hospital and diagnosed with schizophrenia. He spoke incoherently and was actively hallucinating: He claimed he killed the devil and exorcized his home. He was transferred to the Kerrville State Hospital for further evaluation and was diagnosed with paranoia and schizophrenia. He had nailed shut the curtains in his home and buried some of his furniture in the backyard, because he believed that the devil was in the furniture. He was transferred to the Waco Veteran's Hospital in May 1986, diagnosed with chronic undifferentiated schizophrenia, and treated with antipsychotic medications.

Mr. Panetti moved to Wisconsin and was admitted to Tomah Veteran's Hospital in July 1986 after failing to comply with his medication regimen. He was again diagnosed with schizophrenia. He was transferred to Cumberland Memorial Hospital and diagnosed with depression, brain dysfunction, delusions, auditory hallucinations, and homicidal ideation toward his family. He was

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[1] Mr. Panetti's medical records were admitted at the second competency-to-stand-trial proceeding in 1994 as State Exhibits 1 through 6.

then transferred to Northern Pines Unified Services Center in August 1986 and diagnosed with depression and suicidal ideation. Mr. Panetti experienced hallucinations, seeing the devil on a wall. He hallucinated blood coming out of the walls. He washed the walls and his house to get rid of the devil. Mr. Panetti appeared to be on the edge of a psychotic break. He was concerned that he might hurt his family.

Upon his return to Texas, Mr. Panetti was again hospitalized at Starlite Village in October 1986 and again diagnosed with schizophrenia. He was transferred to the Kerrville Veterans Hospital in November 1986 and diagnosed with schizoaffective disorder.

In 1990, Mr. Panetti was involuntarily committed to the Kerrville State Hospital for homicidal behavior: He had threatened to kill his wife, baby, father-in-law, and himself. The citizens of Kerrville, Texas, were plotting against him, he believed.. In 1992, after threatening his family and suffering from delusions of grandiosity and psychotic religiosity, he was admitted to the Kerrville Veterans Hospital and diagnosed with schizoaffective disorder. During this hospitalization, the records revealed the possible presence of three personalities that he had given names to.

In the midst of his severe mental health problems, he and his wife separated, and she took their three-year-old daughter and began living with her parents. On September 8, 1992, Mr. Panetti sawed off the barrel of a shotgun, shaved his head, dressed in Army fatigues, went to the residence of his parents-in-law, Joe and Amanda Alvarado, and shot them in front of his wife and daughter. He then took his wife and daughter to his bunkhouse. He eventually released them unharmed. When the police surrounded his bunkhouse, Mr. Panetti changed into a suit and surrendered to the police.

B. Competency-to-Stand-Trial Proceedings

Based on Mr. Panetti's lengthy history of severe mental health problems, a competency trial

was held in 1994. After the jury deliberated for nearly twelve hours, the judge declared a mistrial. 10 RR 371, 379.[2] Notes in the record indicate that the jury deadlocked 9-to-3 in favor of incompetency. 3 CR 290. A little more than a month later, after the trial court ordered a change of venue, a new jury heard nearly identical evidence about Mr. Panetti's competency to stand trial.[3]

At the second competency trial, Mr. Panetti's defense counsel, Richard Mosty, testified that, under stress, Mr. Panetti would become delusional and unresponsive to his questions. During conversations, Mr. Panetti often said that he felt possessed by demons and had been visited by angels and Jesus. Mosty testified that he could not have a meaningful conversation with Mr. Panetti about the legal issues in the case. He concluded that Mr. Panetti was not competent to stand trial. 13 RR 20-50.

Dr. Richard Coons, a forensic psychiatrist, performed a competency evaluation. He found Mr. Panetti suffered from schizophrenia. Dr. Coons testified that Mr. Panetti decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient. As an example of Mr. Panetti's disordered thought processes, Dr. Coons listed the topics Mr. Panetti talked about during one of their meetings:

> [H]e began to talk about scripture and then he began, with no prompting from me, no interjection from me whatsoever, he went from scripture to being in jail in Bell

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[2] Citations to the reporter's record of the capital murder trial and the competency-to-stand-trial proceedings are noted as "__ RR __." Citations to the clerk's record of the capital murder trial and competency-to-stand-trial proceedings are noted as "__ CR __." Citations to the competency-to-be-executed hearing held in federal district court are noted as "__ FH __."

[3] The parties presented virtually the same evidence at both competency trials. All but one of the witnesses testified at both competency trials. Only Dr. Michael Lennhoff, a defense expert at the first competency proceeding who testified that Mr. Panetti had the ability to rationally understand the proceedings and consult with his lawyers, did not testify at the second competency proceeding.

> County to the way prisoners look, to the Waco Veterans Administration Hospital. He described patients. He talked about lightning, talked about having been drowned a couple of times, the Lord wants me to help a person, talked about the meaning of life, suicidal thoughts, his mother's prayers, so much to be thankful for, problem marriages, women he's dated, rodeo, drinking, tequila in old Mexico, the YO Ranch, his battle with the bottle, a mescal dream of a bottle with worms in it, dope dealer sitting in the courtroom, Luke, Chapter 13 Verse 33, new saddle, boots, boot maker is dead, hobbles for a horse, an old piece of cotton rope and riding with a lead shank.

13 RR 63-64. According to Dr. Coons, Mr. Panetti had other distractions besides his disordered thinking that prevented him from rationally assisting his lawyers: He hears some voices that may have "particular religious significance" and others that are "more precise and commanding." *Id.* at 65. Dr. Coons concluded that Mr. Panetti could not consult with his attorneys with a reasonable degree of rational understanding, and that Mr. Panetti did not have a rational understanding of the proceedings. *Id.* at 59-85.

Dr. E. Lee Simes, a psychiatrist, testified Mr. Panetti is clearly mentally ill, that his thought processes are tangential, and that he most likely suffers from schizophrenia. Dr. Simes concluded that Mr. Panetti was competent to stand trial. However, Dr. Simes admitted on cross-examination that he recalled Mr. Panetti's delusional, irrational thinking about "gold dust coming down and spiritually filling him," "the demons Dagon and Beelzebub," and "the tinglies." 13 RR 153-54. Dr. Simes also recalled Mr. Panetti's delusional thoughts about the four personalities inside him and his belief that the purpose of the competency trial was to provide him with the proper medication. Dr. Simes admitted that when he asked Mr. Panetti about the role of his lawyers, he never gave a rational response. Dr. Simes also conceded that when he testified at the first competency trial, he said that Mr. Panetti believed the President was Ford or Nixon. Dr. Simes agreed that stress exacerbates schizophrenia and Mr. Panetti's delusions could make him incapable of assisting his attorneys. Dr.

Simes testified that, as the capital murder trial progressed and the stress increased, it was "quite possible" that Mr. Panetti would decompensate. *Id.* at 174.

Mr. Panetti was found competent to stand trial. 13 RR 206-07.

C. Mr. Panetti's Decision to Waive the Assistance of Counsel

On April 1, 1995, Mr. Panetti had a "revelation" that he was a "born-again April fool" whose schizophrenia had been cured by God. 15 RR 9.[4] He refused to take any more antipsychotic medication.[5] Less than three months later, Mr. Panetti asked the trial court to allow him to represent himself. 15 RR 14-16, 26. His attorneys told the judge that they did not feel Mr. Panetti was competent to stand trial, did not understand the process, and should not represent himself. *Id.* The prosecution objected to allowing defense counsel to withdraw, stating:

> I don't think the State could agree to this, if that's an issue with the Court, but I did want to put that on record. We are concerned about protecting the Defendant's rights. I think they would be best served by leaving counsel in based on the record we have heard today.

*Id.* at 23-24. Based on the jury's finding that Mr. Panetti was competent to stand trial, the court ruled that he could represent himself. *Id.* at 29-30.

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[4] Mr. Panetti described this "revelation" in his opening statement to the jury at the guilt-innocence phase of his capital murder trial:

> In my year in the Waco Branch Davidian expert's cell in Bell County, I didn't hear from my previous law firm, and I got paranoid that I wasn't being told or lost a chance to appeal the decision of the illegal evidence that was found illegal and then found legal, and I came to the conclusion after my medicine was taken from me and I went into the paranoia and the thought disorder that it depended on me, the April fool, as I consider myself the born again April fool, not saying being born again bars someone from being able to sin, but I depended on the Lord to do for me what the medicine wasn't doing.

31 RR 31-32.

[5] Mr. Panetti has not taken any antipsychotic medication since that day.

D. Mr. Panetti's Refusal to Take Antipsychotic Medication

Mr. Panetti stopped taking any medication to alleviate his symptoms of schizophrenia on April 1, 1995. He began representing himself three months later. However, Mr. Panetti was taking antipsychotic medicine when he was found competent to stand trial. The undisputed evidence presented at the competency-to-stand-trial proceedings showed that his schizophrenic symptoms (delusions, hallucinations, tangentiality, and circumstantial thinking) markedly diminished when he was taking his medication. 13 RR 67-70 (testimony of Dr. Richard Coons); *see id.* at 74 (testifying that medication and hospitalization have had a "positive influence" on Mr. Panetti); *id.* at 80 (testifying that Mr. Panetti "gets better" when he is treated). Dr. Coons stated that Mr. Panetti was currently being treated with such a heavy dosage of Trilafon that it would render somebody without a severe mental illness dysfunctional. *Id.* at 69, 71. Without any medication, according to Dr. Coons, Mr. Panetti would be "very psychotic," "tremendously paranoid," and "more delusional." *Id.* at 71. Dr. Coons believed, however, that Mr. Panetti's condition would improve with better treatment and more potent medication than Trilafon. *Id.* at 76-77; *see id.* at 80 (testifying that Mr. Panetti "is not being treated with the heavy-duty meds that I think he should be").[6] Dr. E. Lee Simes,

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[6] Dr. Coons's testimony at the first competency proceeding was substantially similar. He testified that Trilafon is "a medium range, medium intensity antipsychotic medication" that is not one of the "more powerful, more potent agents" for treating someone in Mr. Panetti's condition. 10 RR 226. He believed that Mr. Panetti needed to be treated with medication "much stronger than Trilafon." *Id.* at 228. Nevertheless, Dr. Coons testified that without the strong dosages of Trilafon, Mr. Panetti "would hear more voices, he'd become more delusional, he would have more strange ideas. His thinking would be even more fragmented and less intense. He would have even less control over his thoughts and behavior." *Id.* at 234-35. Dr. Coons also noted that Mr. Panetti's condition usually improves when he has been hospitalized and properly medicated. *Id.* at 228, 247.

Dr. Lennhoff, who testified only at the first competency proceeding, also recommended that Mr. Panetti be treated with newer, more powerful medication to determine if his condition would improve. 9 RR 257.

the State's expert who testified at the 1994 competency hearings, agreed with Dr. Coons that Mr. Panetti's condition would worsen if he were not taking any antipsychotic medication. 9 RR 279.[7]

After Mr. Panetti began representing himself, he asked the judge on several occasions that he be given the proper medications and an opportunity to see a psychiatrist. At a pretrial hearing on August 14, 1994, Mr. Panetti said, "I haven't had the proper medication since April of '91 and I'm pretty much convinced of my healing and a need not for it, and if I was offered a state of the art new medication where I was offered just old stuff, I may consider a medication that may help my conduct in court from here on . . . ." 19 RR 42; *see id.* at 30 ("All I'm asking is for a simple lick out of the shoot, such as medicine, such as treatment, not to delay, and we'll deal with the witnesses' subpoena and continuance and forgive me for rambling on, Your Honor."). The judge denied Mr. Panetti's motion for continuance. *Id.* at 60-61. In that same hearing, the judge said, "the next motion is a motion for treatment of mental illness and I think I have already addressed that. That's outside of my jurisdiction, and that's denied." *Id.* at 26. At a pretrial hearing on September 6, 1995, Mr. Panetti mentioned his desire to speak with a psychiatrist. The appointment was scheduled for September 12th, the same day the judge had set for the case-in-chief to begin. The judge responded, "I'm hesitant to do anything that's going to get us off track for going, you know, 9:00 to 5:00 every day on the trial. If it is after 5:00, I don't have a problem, and then, as I told you yesterday, if you can change that appointment to the 11th, that would really be the best thing." 30 RR 8-9. Finally, on

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[7] Dr. Arambula stated in the report he prepared for state habeas counsel that Mr. Panetti's refusal to take any medication in the months leading up to his trial, coupled with "the stress of a trial upon any defendant, much less one representing himself," would lead any clinician to "reasonably foresee that Mr. Panetti's symptoms would worsen." Affidavit of Michael Arambula, M.D., R.Ph. at 5-6. In this unmedicated state, Mr. Panetti "deteriorate[d] to such a level that he was subject to persecutory delusions and severe disturbances in his thinking (and ability to communicate with others). *Id.* at 7.

September 12, 1995, the first day of the trial, Mr. Panetti requested a continuance. He expressed his concerns about getting a non-drowsy medication so that he would be able to think clearly, because "I had problems with certain jurors that I couldn't think clearly enough to ask them a certain question and I declined to ask those questions." He argued that he needed to have medicine and see a psychiatrist so that he would "be prepared to cross-examine, to think clearly, to cross-examine witnesses clearly." 31 RR 13-17. The trial court denied Mr. Panetti's request for a continuance.

E. The Capital Murder Trial

Representing himself, Mr. Panetti raised a defense of not guilty by reason of insanity. He dressed in a "Tom Mix" outfit like a cowboy in an old television Western. He wore a cowboy hat in court that hung on a string over his back. leather suede pants tucked into his cowboy boots, and a burgundy double-folded Western shirt with a bandana. He peppered his remarks to the court and questions to the witnesses with phrases like "bronc steer," "pardner," "run away mule," "buckaroo," and "hosses." He made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries (tangential thinking); exhibited sudden changes in his thought processes (flight of ideas); asked questions that were incomprehensible or not coherently connected together (loose associations); rambled incessantly and in such extraneous detail that the main point was obscured (circumstantial thinking); perseverated; recited senseless, fragmented prose; badgered the judge, the prosecuting attorney, and witnesses; and resisted the judge's repeated efforts to control his conduct.

Several excerpts from various portions of the trial provide compelling evidence of the severity of Mr. Panetti's mental illness:

- Mr. Panetti applied for over 200 subpoenas, including John F. Kennedy, Pope John

Paul II, and Jesus. He listed Jesus's address as "everywhere" and the county of residence as "Heaven." *See* 36 RR 1207 ("I didn't want to go subpoena crazy and I turned the Pope loose and J.F.K. and I never subpoenaed them, but Jesus Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that.").

- Mr. Panetti made bizarre comments to the panel of prospective jurors during general voir dire:

  The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister. Adjustment, Jesus wrote. I was born in the North woods in a reservation hospital and my granddad was a justice of the peace and he sobered up the doctor and the doctor was half sobered and they delivered me and my mom had a bad sickness in her milk and they wondered why I wasn't dead, and a lot of beatings I took from the kids that show me had prejudice, which I don't have any prejudice, and they said this about me in the newspapers in the beginning, but I don't love Injuns and Mexicano, and Mexicano know, but I suffered a lot of reverse prejudice from Colored people, which is rare, darn rare, but I was named "He who doesn't cry" because I didn't cry when I should have, and I must admit, though, in Gillespie County Jail when I was in my little suicide box where there was an old boy committed suicide, I went through about a week of pretty much scuba diver's tears; although, I don't scuba.

  RR vol. 21 at 87-88.

- He asked rambling, nonsensical questions of trial witnesses:

  Mr. Panetti: Canteen where – I was expecting the whole list to question, Donna Stanley, educated, expert.

  The Court: You need to ask a question, Mr. Panetti.

  Mr. Panetti: I hope you don't find any more – well, Dr. Bayardo, he didn't find any offense when I mentioned "Quincy." We didn't say whether we liked the show, but we mentioned about the beginning where the cops got sick, and I asked him that naturally for a reason, but I didn't ask him if it made the job popular or anything, but when it comes to dealing with blood, his autopsy, and the crime scene, your expert evidence, autopsy, crime scene. I'm thinking out loud, so I don't ask you questions that you're – well, it would be like asking a rodeo hand what cutting a horse means. They might know it all, but I just – have you got those pictures of the glow-in-the-dark?

32 RR 443.

- The judge repeatedly warned Mr. Panetti to ask relevant questions:

The Court: Well, can you tell me how it's going to be relevant, Mr. Panetti? I'm not sure how your belt buckle is relevant to this issue.

Mr. Panetti: Your Honor, I beg the pardon of the Court, but if I was to – not a gambler, but I found in the jury selection and whatnot that it was compared, legal business was. In other words, if I go ahead, or if I would have requested this buckle brought out earlier, or if I would have requested it later, in light of the fact that it may not be brought in, I would have been telling the District Attorney, such as subpoena list that had to change because some of his witnesses weren't called that I had to recall.

The Court: Mr. Panetti, at this time I don't see how the belt buckle is relevant to any issue this jury is going to determine and so if you can't explain the relevance to me, I'm going to sustain the objection. Can you explain to me how the belt buckle is relevant to any issue in this case?

Mr. Panetti: Yes, I can, Your Honor. It has to do with jailhouse religion. It has to do what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It as to do with my whole outlook and this will come up, God forbid, in the punishment stage.

Before religion, when you got religion, prior religion, church member, I'm going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.

33 RR 755-56.

- Mr. Panetti took the stand in his own defense at the guilt-innocence stage of the trial and proceeded to tell his life story, including: his birth, his mother's milk sickness, his parents fighting, his near-drowning, his clothes and haircut, his tattoo, a horse flipping over on him and his castrating that horse later, working with his father, farming, receiving military fatigues after his uncle returned from Vietnam, a school play, a girlfriend who got him into rodeo, his sexual experiences, his job as an artificial insemination technician for cattle, drinking, smoking marijuana, horses his

family owned when he was growing up, riding a minibike, watching his friend who was a diabetic injecting insulin, his girlfriend's abortion, being a cowboy and bull rider, an automobile accident he was in, going into the Navy, intelligence training, being drugged with LSD and PCP in the Navy by a fellow soldier, his brother's wedding, taking cocaine with a nurse after leaving the Navy, talking with a man who worked for Frederick's of Hollywood who wanted him to model lingerie, his marriages, his near-electrocution, killing a rattlesnake, being an extra in a movie, attending cosmetology school and cutting his sister's hair, accidentally being shot in the leg, and seeing the devil.

37 RR 1447-1556.[8]

- Despite the trial court's repeated orders to testify only about certain topics, Mr. Panetti's perseveration prevented him from obeying them:

| | |
|---|---|
| The Court: | Mr. Panetti, get to the LSD incident. |
| Mr. Panetti: | And – |
| The Court: | Right now. |
| Mr. Panetti: | Right now. I went – now, my military records, sir, this is thick, and I'm going to make it that thick, but I'm just going to briefly move to the LSD incident. |
| The Court: | Go straight to it right now. |
| Mr. Panetti: | Okay. They – they said, "You're so highly qualified." |
| The Court: | No, straight to the LSD incident. |
| Mr. Panetti: | Well, sir – |
| The Court: | Go straight to the LSD incident. |
| Mr. Panetti: | That was my third and final duty station, but right in the middle I'll just quickly touch a short stint. |
| The Court: | No, don't touch on the short stint. Go straight to the LSD incident. |
| Mr. Panetti: | First time I requested to see a psychiatrist, I thought that I might be disciplinaried, and they – I didn't know how to go about that. Straight to, okay, straight to. Your Honor, may I just briefly touch on the brief situation of – briefly to that incident? |

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[8] The judge admonished Mr. Panetti about the relevance of his testimony:

> Mr. Panetti, for the last 35 minutes we have been listening to Navy stories that I do not deem relevant. I am not going to let you ramble and tell the jury your life story. I wouldn't let the State have a witness on and just ramble and tell his life story. I'm going to insist that you get to issues that you think this jury can use in making their determination of whether or not you're guilty or innocent of the charges against you.

37 RR 1478.

The Court: No.
Mr. Panetti: It has relevance, sir.
The Court: No.
Mr. Panetti: It does have relevance, sir.
The Court: Go straight to the LSD incident.
Mr. Panetti: They said –

(At which time there was a long pause.)

Mr. Panetti: They said – they said, "What do you want to do?" I said, "Just let me run heavy equipment.", and they said, "No, you can't. That's full up. You cant be in HCB."
The Court: Mr. Panetti –
Mr. Panetti: And I'm coming right up to my first taste of LSD.
The Court: Stop. Ladies and gentlemen, we're going to recess –

37 RR 1476-77.

- Assuming the personality of "Sarge," Mr. Panetti testified about the crime:

Joe, Joe, Amanda, no talking, no words, knife, Sarge knife, threatened, scared, fight, no. Sarge shoots, CC. Sarge turns, shoots, boom, boom. Where is Amanda? Mom is dead. Joe look up. No. Where's Birdie? Sonja bedroom. Birdie. Joe. Where's Amanda. Sarge, Sarge, left a bullet. Scott, what? Scott, what did you see Sarge do?

Fall. Sonja, Joe, Amanda, kitchen. Joe bayonet, not attacking. Sarge not afraid, not threatened. Sarge not angry, not mad. Sarge, boom, boom. Sarge, boom, boom, boom, boom. Sarge, boom, boom.

Sarge is gone. No more Sarge. Sonja and Birdie. Birdie and Sonja. Joe, Amanda lying kitchen, here, there, blood. No, leave. Scott, remember exactly what Sarge did. Shot the lock. Walked in the kitchen. Sonja, where's Birdie? Sonja here. Joe, bayonet, door, Amanda. Boom, boom, blood, blood.

Demons. Ha, ha, ha, ha, oh, Lord, oh, you.

The Court: Mr. Panetti, let's stop.
Mr. Panetti: You puppet.
The Court: Mr. Panetti, we're going to take about a five-minute recess.

37 RR 1544-46.

- Mr. Panetti delivered an incoherent guilt-innocence phase closing argument:

> Ladies and gentlemen of the jury, I think that State will have more than a few comments, judging by the time allowed to respond to mine. Briefly, in 45 minutes you might wonder a little bit about when I testified, and Scott and Sarge and who talked and who talked about who and who talked about what and in light of Dr. Simes not being here, he did leave this letter and it will explain that and it has something to do about me showing you the tattoo and introduce you to Will, and I don't tell you Texas Will and Chaplain or Montana Will and go into that, and the evidence will, if you read that, look over that, might explain that. I wish you not to mistake charisma for sanity. Charisma is by definition a spiritual gift.
>
> Briefly touching on just a few of the – demon dabbling is my understanding just a nonphysical being hostile to humans and God, caused by bad influences and disease, mental distress on human beings.
>
> *See* 38 RR 1645-63.

- Mr. Panetti delivered an incoherent punishment phase closing argument:

> You know, just to touch on the spat and wasn't cuffed, but I was bronc and Sheriff Kaiser and I had a talk, well, of the fact that I'm no longer American citizen, and because of my buckaroo case. I believe city people love horses, too, and I don't consider myself anything above or below anyone, but I do consider myself me, and when I made my last confession at Veterans Hospital to Father De la Garza, I wasn't Catholic.
>
> *See* 39 RR 85-90.

On September 21, 1995, the jury found Mr. Panetti guilty of capital murder. The next day, the punishment phase began. The prosecution called two witnesses, including Dr. James Grigson, who testified that antipsychotic medications would not reduce the likelihood that Mr. Panetti would be a future danger to society. 39 RR 54, 60. Mr. Panetti called only one witness, his stand-by counsel. He was sentenced to death the same day. 7 CR 1033-38.

Dr. Wolfgang Selck, a psychiatrist who treated Mr. Panetti at the Starlite Village Hospital in 1986, and whom Mr. Panetti called as a witness, watched a day-and-a-half of the trial before he testified. Dr. Selck later provided state habeas counsel with an affidavit setting out his observations

of Mr. Panetti's behavior in the courtroom:

> Scott was acting as his own attorney from his paranoid fear that the attorneys were out to get him. Due to the paranoia, Scott was lead [sic] by his mental illness to demand to represent himself. Since Scott could not trust lawyers to represent him, he had to represent himself. This decision was a facet of his paranoia and severe mental illness.
>
> * * * *
>
> As a psychiatrist I also observe the emotion rather than the contents of the sentence. The emotion that Scott displayed was also a clear sign of mental illness and incompetence. To the lay person and the jury, it may have appeared that Scott was capable because he appeared normal in the sense that he could talk in sentences, ask questions, and argue. One reason that some mental illness is difficult to determine is because paranoid people are usually sharp in certain areas. A paranoid schizophrenic may be alert to time and place, but, this has to be contrasted with the verbal rambling where the person is lost in irrelevant talk or where the person has fixed ideas.

Affidavit of Wolfgang Selck, Ph.D., at 3-4.

Mr. Panetti also called Dr. F.E. Seale, another psychiatrist who treated Mr. Panetti at the Starlite Village Hospital in 1986, to testify at the capital murder trial. Dr. Seale had an opportunity to watch Mr. Panetti in court for an entire day, and later gave state habeas counsel an affidavit containing his opinion about Mr. Panetti's behavior:

> When I observed Scott in September 1995 at his trial, I would describe Scott as delusional.
>
> * * * *
>
> My main impression was why was the Judge allowing this crazy man to defend himself. I thought to myself, "My God. How in the world can our legal system allow an insane man to defend himself? How can this be just?" I not only thought Scott was incompetent, but, that it was not moral to have him stand trial. It was terribly wrong. I did not know that our legal system would allow an insane man to represent himself in his own trial.
>
> * * * *
>
> Scott was acting out a role that was a delusion of a specific war hero. He described the shooting in the role of Sarge. He acted out the role in the Courtroom. Scott was totally out of touch with reality. He had no knowledge of the effect of his actions in Court. I think that Scott was enjoying playing the role of Sarge. This is a sure sign of obvious mental illness.

> The main thing that I specifically remember about Scott was his manner and the grandiosity of his ideas. Scott enjoyed being an attorney describing his role in the crime. The Court allowed Scott to perform.

Affidavit of F.E. Seale, Ph.D., at 1-2.

Dr. Michael R. Arambula, a forensic psychiatrist, provided state habeas counsel with an evaluation of Mr. Panetti's mental status at the trial. He reviewed the medical records, conducted a clinical interview, and read the trial transcript. Dr. Arambula's report contains several insights about Mr. Panetti's behavior during the trial:

> There are numerous incidents in Mr. Panetti's trial when he exhibits flight of ideas and grandiosity (symptoms of mania), but there are even more examples of looseness of associations and tangentiality in his thought processes (symptoms of Schizophrenia). Example after example of the court repeatedly redirecting Mr. Panetti to stay on line with relevant evidence is a stark example of how he cannot think and communicate rationally because of his underlying disease. It is certainly understandable from a lay point of view how frustrating it was for the court, particularly not appreciating that Mr. Panetti's disease was the reason for his inability to comply with the judge's requests.
>
> * * * *
>
> It is clear to this examiner that Mr. Panetti retains personal choice throughout his trial proceedings. This is not unexpected, since even the most psychotic individuals I have seen in my career still have personal preferences and choices. However, the clinical crux of a reasoned choice is determined by whether a person's psychotic thought process is involved in that decision-making process.
>
> * * * *
>
> Mr. Panetti's testimony indicates that he is cognitively impaired by his own thought disorder. Even though Mr. Panetti's choice to represent himself is a personal decision, his ability to carry out this personal decision is still limited by his psychotic disease. Mr. Panetti's thought disorder renders his thinking incoherent, illogical, and goal non-directed.

Affidavit of Michael R. Arambula, M.D., R.Ph., at 6 (emphasis omitted).

F. The Appellate and Post-Conviction Proceedings

Mr. Panetti agreed to be represented by counsel on direct appeal. Appellate counsel raised several points of error related to Mr. Panetti's competency. The Texas Court of Criminal Appeals

rejected the claims and affirmed Mr. Panetti's conviction and sentence. *Panetti v. State*, AP-72,230 (Tex. Crim. App. Dec. 3, 1997) (unpublished). This Court denied his petition for a writ of certiorari on October 5, 1998. *Panetti v. Texas*, 525 U.S. 848 (1998).

Mr. Panetti, represented by counsel, filed his state application for writ of habeas corpus on June 19, 1997.[9] In it, he raised several claims related to his competency. Adopting verbatim the findings and conclusions authored by the District Attorney, the trial court recommended that habeas relief be denied. The Texas Court of Criminal Appeals adopted the trial court's findings and conclusions. *Ex parte Panetti*, Writ No. 37,145 (Tex. Crim. App. May 20, 1998) (per curiam) (unpublished).

Mr. Panetti filed his federal habeas petition on September 7, 1999. The district court held that Mr. Panetti had not exhausted his claims that he was incompetent to stand trial and that the judge should have held an additional hearing to determine his competency. *Panetti v. Johnson*, No. A-99-CA-260-SS (W.D. Tex. Mar. 9, 2001) (unpublished). The Fifth Circuit found that Mr. Panetti had properly exhausted the competency claims, but the appeals court then denied them on the merits. *Panetti v. Cockrell*, No. 01-50347 (5th Cir. Jul. 19, 2003) (unpublished).

G. Competency-to-Be-Executed Proceedings

After the conclusion of the federal habeas proceedings in the Fifth Circuit, the state trial court set an execution date for February 5, 2004. Counsel for Mr. Panetti filed a motion pursuant to Article 46.05 of the Texas Code of Criminal Procedure, asserting that *Ford v. Wainwright*, 477 U.S.

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[9] In September 1996, the trial court held a hearing to determine whether Mr. Panetti was indigent and desired the appointment of state habeas counsel. Mr. Panetti stated that he did not feel competent to decide whether he wanted to represent himself or request court-appointed counsel. The judge found that any waiver given at that time would "not be voluntary and intelligently made" and appointed counsel to represent Mr. Panetti in state habeas proceedings. 43 RR 9.

399 (1986), prohibited Mr. Panetti's execution. The federal district court later stayed the execution to allow the state court to adjudicate the Article 46.05 motion. On February 20, 2004, the trial court found that Mr. Panetti had made a substantial showing of incompetency and, in accordance with the statute, appointed two mental health professionals, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, to exam Mr. Panetti. The court-appointed experts examined Mr. Panetti jointly and co-authored a report. They concluded that Mr. Panetti was competent, because he knew that he was to be executed and he had the ability to understand the reason for his execution.

Mr. Panetti sought the appointment of counsel, funds to hire a mental health expert, and funds to hire an investigator. He also asked the state court to hold a hearing, as required under Article 46.05.[10] On May 26, 2004, the state court concluded that Mr. Panetti "ha[d] failed to show, by a preponderance of the evidence, that he is incompetent to be executed."

The federal district court held that the state court, by failing to hold a hearing, had violated the minimal procedural due process requirements of *Ford*. The district court ordered an evidentiary hearing and granted Mr. Panetti's motion for appointment of counsel, motions for funds for expert and investigative assistance, and motion for discovery. In September 2004, the district court held the evidentiary hearing. Counsel for Mr. Panetti presented the testimony of four mental health experts. The State of Texas presented the testimony of three death row correctional officers and the two mental health experts, Dr. Parker and Dr. Anderson, appointed in the state court proceedings.

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[10] Once an inmate has made a substantial showing of incompetency, not only must the trial court appoint at least two mental health experts, but it also must eventually hold a "final competency hearing" before it makes a determination of the inmate's competency to be executed. TEX. CODE CRIM. PROC. art. 46.05(k).

Counsel for Mr. Panetti first called Mary Alice Conroy, a forensic psychologist who had worked for twenty years with the Federal Bureau of Prisons evaluating and treating prisoners with severe mental illness. Dr. Conroy testified that Mr. Panetti suffers from a form of schizophrenia called schizoaffective disorder. She said that "his thinking does not fit together in any kind of logical, rational way," and that his symptoms include pressured speech, flight of ideas, loose associations, and inappropriate affect. 1 FH 14, 21-22. Dr. Conroy testified that Mr. Panetti knows he is on death row and that the State intends to execute him. She said that he is aware that the State wants to put him to death for murdering his parents-in-law, but that he believes "that's really a sham." *Id.* at 25. According to Dr. Conroy:

> His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness, and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the State wants to kill him is not what they're saying.

*Id.* Dr. Conroy testified that, although Mr. Panetti can at times answer concrete questions, he does not "perceive or appreciate the connection between his killing of his in-laws and his execution." *Id.* at 26.

Susana A. Rosin, a psychologist, testified that Mr. Panetti has a set of fixed delusions that center around grandiose ideas that he must save others by preaching the word of God. Dr. Rosin testified that Mr. Panetti could hold a normal conversation if the topic of discussion did not deal with his fixed delusional system. She believed that he knows he is on death row and that he is going to be executed. Dr. Rosin also testified that Mr. Panetti knows he killed his parents-in-law. However, he told her that he did not believe these murders are the real reason the State seeks his execution.

Mr. Panetti told Dr. Rosin that "he was going to be executed for preaching the gospel" and that "the forces of evil, demons, devils are basically set against him." *Id.* at 82, 89-90.

The last witness counsel for Mr. Panetti called during its case-in-chief was Seth Silverman, a psychiatrist. Dr. Silverman testified that Mr. Panetti believes an individual named "Sarge" killed his parents-in-law. Dr. Silverman said that Mr. Panetti knows the State wants to execute him, but that these murders are not the reason. Mr. Panetti told Dr. Silverman that the real reason is "[b]ecause he preaches the word of the gospel." *Id.* at 109-10.

Dr. George Parker, the psychologist whom the state court had been appointed for the Article 46.05 proceedings, testified that he attempted, along with Dr. Mary Anderson, to evaluate Mr. Panetti. According to Dr. Parker, Mr. Panetti refused to cooperate with the evaluation, because Dr. Parker and Dr. Anderson would not answer his question about their religious preferences. Dr. Parker admitted that Mr. Panetti suffered from "serious psychological problems." *Id.* at 134. He also testified that Mr. Panetti had the ability at times to function in a coherent manner. *Id.* at 140. Dr. Parker testified that simply because "Mr. Panetti is preoccupied with religion and may even, at some level, genuinely believe that he is being executed for preaching the gospel," does not "render him incapable of understanding why the authorities have ordered his execution." *Id.* at 142. Dr. Parker admitted, however, that he does not know whether Mr. Panetti understands why he is going to be executed, "but that he is capable of understanding." *Id.* On cross-examination, Dr. Parker testified that Mr. Panetti said he was on death row because "they don't want me to preach the word of God." *Id.* at 150.

The other expert the State called was Mary Anderson, the forensic psychiatrist who had examined Mr. Panetti in state court. Dr. Anderson testified that she did not make a conclusion about

whether Mr. Panetti is competent to be executed. She explained that Mr. Panetti was not cooperative with the evaluation: He would not answer her and Dr. Parker's questions, because they had refused to respond to Mr. Panetti's question whether they believed in Jesus. Mr. Panetti told Dr. Anderson that he is going to be executed for preaching the gospel. However, Dr. Anderson believed that Mr. Panetti had the capacity to understand the real reason why he is going to be executed. She said that Mr. Panetti's refusal to cooperate with the evaluation was the result of deliberate, conscious choice rather than the product of mental illness. She refused to conclude that Mr. Panetti suffers from schizophrenia, because she did not think that his mental illness is relevant to the competency determination. 2FH 40-41.

Counsel for Mr. Panetti called Mark Cunningham, a clinical and forensic psychologist, as a rebuttal witness. Dr. Cunningham testified that the conclusions of Dr. Parker and Dr. Anderson that Mr. Panetti was deliberately uncooperative were not a fair characterization of his behavior. Dr. Cunningham explained that Mr. Panetti has a lengthy history of responding to questions with religiosity rather than concrete answers. Dr. Cunningham said that Mr. Panetti did not behave in a fundamentally different way with Dr. Parker and Dr. Anderson than he has with numerous other persons throughout the criminal proceedings. Emphasizing that Mr. Panetti's behavior is entirely consistent with his diagnosis, Dr. Cunningham explained the nature of schizophrenia:

> [Y]ou have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. It doesn't make them retarded where they don't know where the door is, don't know you're a doctor, don't understand that these are corrections officers. It doesn't render them stupid.
>
> Instead, you have a situation where – and why we call schizophrenia thought disorder is the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and comes out in a tangential, circumstantial,

> symbolic sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.
>
> And so, when I encounter somebody like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic, and that's what they can do under these demand characteristics. Now, it may be that if they're dealing with someone who's more familiar, if they're inside their own cell, where they spend 23 hours a day and have for years, and what may feel like a safer, more enclosed environment for them – and we're talking through this little screen in the door about their commissary, or about whether they're going to come out for a visit, that these sorts of interactions may be reasonably lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

2 FH 63-64.

Dr. Cunningham testified that Mr. Panetti believes the State of Texas is not acting as a lawfully constituted authority in seeking his execution. Instead, according to Dr. Cunningham, Mr. Panetti thinks that the State "is in league with the forces of evil to prevent him from preaching the gospel." *Id.* at 70. Dr. Cunningham identified this as a "specific delusional belief," consistent with Mr. Panetti's "long-standing delusions of religiosity" and diagnoses of schizophrenia and schizoaffective disorder. *Id.*

H. Evidence of Mr. Panetti's Deteriorating Condition

At the federal evidentiary hearing, Mr. Panetti's expert witnesses unequivocally stated that Mr. Panetti's mental condition has deteriorated since a jury found him competent to stand trial. Dr. Conroy attributed his deterioration to the fact that he has not been on any kind of psychotropic medication since his "April Fool's Day revelation" in 1995. Dr. Silverman also testified that Mr. Panetti was more lucid, coherent, and logical when he took his medication. He stated that Mr. Panetti's mental illness "has progressed more significantly" since he stopped taking his medication

in 1995. 1 FH 117. Noting the type and amount of medication that Mr. Panetti was taking on a daily basis prior to his pre-trial competency hearings, Dr. Silverman explained that:

> I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal, without absolutely being put out. And when you wake up, you can't think. You have kind of like the lights on, nobody's home. It just doesn't happen. And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

*Id.* at 122. Dr. Silverman concluded that the lack of medication in a case like Mr. Panetti's would most likely lead to "a more severe refractory kind of illness." *Id.* at 125.

## HOW THE ISSUES WERE DECIDED BELOW

On September 29, 2004, the district court denied relief on Mr. Panetti's claim of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti v. Dretke*, 401 F. Supp.2d 702 (W.D. Tex. 2004). The court, with some reluctance, concluded that *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), controlled the outcome. In *Barnard*, the Fifth Circuit set out the state habeas court's findings of fact:

> Applicant's experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.

*Id.* at 876. The Fifth Circuit concluded that these findings were entitled to the presumption of correctness and held that "[t]he state court thus found that Barnard knew that he was going to be executed and why he was going to be executed – precisely the finding required by the *Ford* standard of competency." *Id.* at 877. In *Panetti*, the district court questioned the *Barnard* court's statement

that it had applied Justice Powell's concurring opinion in *Ford* as the appropriate standard for determining competency for execution:

> Although the court stated it was following the Powell concurrence in reaching its conclusion that the standard for competency had been satisfied, it did not even suggest the presence of an issue with respect to its "retributive goal" aspect. Had the court determined the "retributive goal" inquiry was required, the result it reached may have been different. At the very least, the state court's findings with respect to the petitioner's delusions would have given rise to an arguable issue about whether his understanding of the reason for his execution was so distorted that the retributive goal of the law would not be satisfied by his execution.

*Panetti*, 401 F. Supp.2d at 711. Bound by *Barnard*, the district court concluded that "a petitioner's delusional beliefs – even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution – do not bear on the question of whether the petitioner 'knows the reason for his execution' for purposes of the Eighth Amendment." *Id.* at 712. Consequently, the district court held: "Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed." *Id.*

On May 9, 2006, the Fifth Circuit affirmed the district court's decision. *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). Noting that *Barnard* was "nearly identical" to Mr. Panetti's case, the court held that "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only that he must be 'aware' of it." *Id.* at 819; *see id.* at 821 (holding that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding'"). Therefore, the Fifth Circuit concluded, Mr. Panetti is competent to be executed, because even though he may lack a rational understanding of the reason for his execution, he is "aware" of the reason the State has given for his execution. *Id.* at 821.

## REASONS THE WRIT SHOULD BE GRANTED

### THE FIFTH CIRCUIT HAS INTERPRETED *FORD V. WAINWRIGHT* SO NARROWLY THAT THE EIGHTH AMENDMENT DOES NOT PROTECT THE INSANE FROM BEING EXECUTED IN TEXAS.

> I've got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this.
>
> – Last Statement of Monty Delk, executed in Texas on February 28, 2002.
>
> Statement to what[?] State what[?] I am not guilty of the charge of capital murder. Steal me and my family's money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer. [Portion of statement omitted due to profanity] Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my life back.
>
> – Last Statement of Kelsey Patterson, executed in Texas on May 18, 2004.
>
> For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.
>
> – *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (majority opinion).

Two decades have passed since this Court decided *Ford*, and the Fifth Circuit has yet to find a ***single*** death row inmate incompetent to be executed. During this same period, the State of Texas has executed 360 people. The execution of Scott Panetti would be but the latest in a growing list of "miserable spectacle[s]" in Texas. *See Ford v. Wainwright*, 477 U.S. 399, 407 (citing 3 E. Coke, Institutes 6 (6th ed. 1680)). The Fifth Circuit has reduced the Eighth Amendment's ban on the execution of the insane into a toothless prohibition. It is unclear who would be protected by the "bare factual awareness" standard the Fifth Circuit began crafting in *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), and completed in *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). However, it is exceedingly clear that the Fifth Circuit's standard provides far less protection to the insane than the

common law ever did. Despite paying lip service to the *Ford* majority's and Justice Powell's retributive rationale as the basis for prohibiting the execution of the insane, the Fifth Circuit has uncoupled Justice Powell's competency standard from its foundation, leaving only a shell of bare awareness.

As the lengthy Statement of Fact reveals, the state and federal courts have grappled with Mr. Panetti's competency at nearly every stage of the criminal proceedings. The compelling nature of this case – including allowing such a severely mentally ill man to represent himself when his life is at stake – provides this Court with an ideal vehicle to ensure that the Fifth Circuit takes into account the retributive goal of capital punishment when assessing competency for execution. Moreover, Mr. Panetti's case, unlike Harold Barnard's or Monty Delk's or Kelsey Patterson's, is unencumbered by state court findings entitled to the presumption of correctness or legal conclusions entitled to AEDPA deference. In addition, the fallout from the *Barnard* case demands this Court's immediate intervention. Spurred on by *Barnard*, the American Bar Association, the American Psychiatric Association, and the American Psychological Association have all recently adopted resolutions that recognize the need for an inmate to have more than a shallow understanding of the reasons for his execution to ensure that the retributive value of capital punishment will be vindicated while still protecting those persons with biologically-based brain disorders – the severely mentally ill. Finally, this Court should grant certiorari because the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). The execution of a man like Mr. Panetti would not only be "savage and inhuman," *Ford*, 477 U.S. at 406, but it would also offend "the dignity of society itself." *Id.* at 410.

Unfortunately, Mr. Panetti cannot look to clemency as a realistic option in Texas. This Court is his last resort.

### A. Because the Fifth Circuit has jettisoned *Ford*'s retributive rationale from the execution competency determination, the Eighth Amendment provides no protection to the severely mentally ill in the nation's busiest death penalty jurisdiction.

This Court must enforce constitutional guarantees – especially in death penalty cases – with particular zeal. The Fifth Circuit, while purportedly adopting Justice Powell's standard for execution competency, has simultaneously undermined *Ford*'s substantive prohibition by refusing to assess an inmate's execution competency in light of the retributive value of capital punishment. It is impossible to reconcile the Fifth Circuit's decisions in *Barnard* and *Panetti* with *Ford*'s explicit recognition that the execution of the insane serves no retributive purpose. The Fifth Circuit's "bare factual awareness" standard carves the heart out of Justice Powell's standard and leaves only the husk – the two-pronged, limited, just-the-bare-facts inquiry.

Numerous commentators agree that a "bare factual awareness" standard will not protect severely mentally ill inmates – those who, at common law, would have been labeled "mad" or "insane" – from execution. *See* L. Elizabeth Chamblee, *Time for a Legislative Change: Florida's Stagnant Standard Governing Competency for Execution*, 31 FLA. ST. U. L. REV. 335, 350 (2004) ("[I]f 'understand' merely means that the inmate should possess a bare mental awareness of execution, then many severely mentally ill people will be deemed competent."); Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823 (2002)("[D]efining sanity as merely having the ability to understand one's crime and fate does not account for the complexities involved with diagnosis and treatment

of mental illness."); John L. Farringer, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to be Executed*, 54 VAND. L. REV. 2441, 2490 (2001) ("Mere knowledge or awareness of an impending execution, without a rational understanding of the reasons for it, is not sufficient to find competency to be executed. Evidence from an expert witness that the person is so deluded that he or she simply cannot relate the crime to the punishment is evidence of such lack of a rational understanding."); *see also Vargas v. Lambert*, 159 F.3d 1161, 1174 (9th Cir. 1998) (Kleinfeld, J., dissenting) ("Mental illness is not binary, such that one is entirely healthy, or so insane that he can do nothing; it is a continuum, like physical illness"). In the Fifth Circuit's view, the *Ford* majority's reliance on retribution as a substantial part of its rationale for banning the execution of the insane, as well as Justice Powell's decision to craft his execution competency standard based on similar reasoning, is entirely extraneous. The Fifth Circuit's crabbed interpretation of *Ford* has not saved a single inmate from the gurney in 20 years. Justice Powell and the *Ford* majority intended the Eighth Amendment's ban to be more than an empty formality that would provide no protection to severely mentally ill death row inmates like Harold Barnard, Monty Delk, Kelsey Patterson, and Scott Panetti.

The Fifth Circuit expressly adopted Justice Powell's execution competency standard. In *Lowenfield v. Butler*, 843 F.2d 183 (5th Cir. 1988), the court repeated verbatim the heart of Justice Powell's opinion:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.



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*Id.* at 187 (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring)). The first sentence summarizes the two common law justifications for barring the execution of the insane that Justice Powell believed still retained their merit. *See Ford*, 477 U.S. at 419-21. The second sentence simply announces the standard that he formulated to take into account those common law concerns.

The portion of the *Ford* opinion that Justice Powell joined to form a majority also recognized the importance of the retributive rationale as a reason for the common law rule against executing the insane. *See id.* at 408 (noting that "the community's quest for retribution – the need to offset a criminal act by a punishment of equivalent moral quality – is not served by execution of an insane person, which has a lesser value than that of the crime for which he is to be punished") (internal quotation marks omitted); *id.* at 409 (recognizing that "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life").[11] Consequently, a condemned inmate must have a real appreciation of the proposition "that, because he has committed an act that society and all civilized humanity finds heinous, he is to be killed." *Martin v. Dugger*, 686 F. Supp. 1523, 1568-70 (S.D. Fla. 1988).

*Barnard* stands in stark contrast to *Lowenfield*. *Barnard* simply lifts from Justice Powell's opinion only the sentence that sets out the standard, and disconnects its from the retributive goal rationale. 13 F.3d at 876 n.2. *Barnard*'s application of the standard to the facts, without taking into account Justice Powell's underlying rationale, renders the competency determination virtually meaningless. *Cf. Barnard*, 13 F.3d at 876 ("Applicant's experts do not establish that he is unaware

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[11] Tellingly, the Fifth Circuit mistakenly attributed the retributive value rationale for barring the execution of the insane to only a plurality of the Court in *Ford*. *See Panetti*, 448 F.3d at 818. However, Justice Powell joined Parts I and II of Justice Marshall's opinion – where the retributive value discussion appears – making it a majority opinion. *See Ford*, 477 U.S. at 401; *id.* at 418 (Powell, J., concurring in part and concurring in the judgment).

of the fact of or the reason for his impending execution, but rather that ***his perception of the reason for his conviction and pending execution is at times distorted by a delusional system*** in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.") (emphasis added), *with Ford*, 477 U.S. at 422 (Powell, J., concurring) ("If the defendant ***perceives the connection between his crime and his punishment***, the retributive goal of the criminal law is satisfied . . . .") (emphasis added); *see also Ford v. Wainwright*, 752 F.2d 526, 531 n.3 (11th Cir. 1985) (Clark, J., dissenting) (noting that "the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance"), *rev'd*, 477 U.S. 399 (1986).

The moral force of retribution is lost if an inmate believes that his execution is being carried out through a conspiracy of demonic forces rather than as a lawful punishment for a horrific crime. If a death-sentenced inmate does not rationally understand that, when the time for execution arrives, this is the price he must pay for his horrible deed, then society does not get the full benefit of retribution. *See* Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1039-46 (1991) (arguing that the retributive system of capital punishment is designed to apply exclusively to rational persons who have the cognitive capacities to answer for their conduct). The execution of an insane inmate is a punishment of a lesser value because, in effect, the person being executed is no longer the same person who was convicted and sentenced to death. *See Solesbee v. Balkcom*, 339 U.S. 9, 19 (1950) (Frankfurter, J., dissenting) ("If a man has gone insane, is he still himself? Is he still the man who was convicted?"), *overruled, Ford v. Wainwright*, 477 U.S. 399 (1986); Note, *Insanity of the Condemned*, 88 Yale L.J. 533, 536 n.17 (1979) (arguing that execution

of the insane is executing a person who for all moral purposes is a different person than the one who committed the crime).

The absence of any retributive value in executing the insane – one of the common law justifications for the prohibition – provides the foundation upon which the *Ford* majority based its decision and Justice Powell constructed his standard. The standard collapses if the foundation is removed. Consequently, the Fifth Circuit's adoption of a "bare factual awareness" standard creates an untenable situation: The Eighth Amendment now provides ***less*** protection to the insane in Texas than the common law did. This Court should grant certiorari to ensure that the severely mentally ill in the nation's busiest death penalty jurisdiction have *Ford*'s full protection.

### B. The confusion sown by *Barnard* has led the American Bar Association, the American Psychiatric Association, and the American Psychological Association to adopt resolutions intended to remind the courts of the retributive value underpinning of *Ford*.

On August 8, 2006, the American Bar Association passed a resolution addressing the execution of severely mentally ill death-sentenced inmates. In February 2006, the American Psychological Association and, in December 2005, the American Psychiatric Association (APA) approved position statements on the same topic. The ABA's resolution and the position statements of the American Psychiatric and Psychological Associations are identical, stating, in part, that "[a] sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case." ABA Resolution 122A (adopted Aug. 8, 2006). The APA Commentary to the policy specifically notes the uncertainty created by the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (footnotes omitted).[12] The APA Commentary then states:

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

*Id.* (emphasis omitted, footnote omitted). The APA Commentary is drawn directly from an earlier report produced by the ABA's Task Force on Mental Disability and the Death Penalty. The decision by the ABA and the American Psychiatric and Psychological Associations to adopt this policy demonstrates that the confusion created by *Barnard* is pervasive and serious. This Court should grant certiorari, emphatically repudiate the interpretation of *Ford* found in *Barnard* and *Panetti*, and provide guidance to the lower courts on a recurring issue.

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[12] *See* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf.

### C. Mr. Panetti's case presents an ideal vehicle for this Court to ensure the Fifth Circuit's compliance with *Ford*.

For several reasons, Mr. Panetti's case is a particularly appropriate vehicle for rejecting the Fifth Circuit's assessment of execution competency. First, the facts surrounding Mr. Panetti's severe mental illness and its effects on his cognitive functioning are compelling and undisputed. Several commentators have focused specifically on his case as an egregious example of the lower courts' reluctance to use *Ford* to protect the profoundly mentally ill. *See, e.g.*, Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1173 (2005); Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1163-64 (2005); *see also* Ralph Blumenthal and Adam Liptak, *Judging Whether a Killer is Sane Enough to Die*, N.Y. TIMES at 1A (Jun. 2, 2006). Second, the lower courts relied exclusively on the controversial decision in *Barnard* as the controlling precedent in Mr. Panetti's case. Mr. Panetti's case presents the "bare factual awareness" issue starkly and cleanly. Third, unlike *Barnard*, *Delk*, or *Patterson*, Mr. Panetti's case does not require this Court to wade through a thicket of procedural barriers before reaching the merits. The presumption of correctness does not apply to the state court's findings of fact in Mr. Panetti's case and the state court's legal conclusions are not entitled to AEDPA deference. The district court held an evidentiary hearing and conducted de novo review of the *Ford* claim, because the state court refused to hold a hearing after finding that Mr. Panetti had made a substantial showing of incompetency. *Panetti*, 401 F. Supp.2d at 705-06. This Court should grant certiorari either to clarify the role the retributive goal rationale plays in assessing the execution competency of the severely mentally ill or simply to correct the error the Fifth Circuit made in Mr. Panetti's case by ignoring it.

## CONCLUSION

The Court should grant certiorari and schedule this case for briefing and oral argument to ensure the Fifth Circuit's compliance with *Ford v. Wainwright*.

Respectfully submitted,

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BY:_____

September 6, 2006

No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**October Term, 2005**

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**SCOTT LOUIS PANETTI,**

**Petitioner,**

**V.**

**NATHANIEL QUARTERMAN,**
**Director, Texas Department of Criminal Justice,**
**Correctional Institutions Division,**

**Respondent.**

---

## CERTIFICATE OF SERVICE

I, Keith S. Hampton, hereby certify that a true and correct copy of Petitioner's Petition for Writ of Certiorari was served on counsel for Respondent on this 6th day of September 2006, via First Class United States Mail, addressed to:

Ms. Tina J. Dettmer
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---

# APPENDIX A

# APPENDIX B

# APPENDIX C

11/13/06

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# No. 06-6407

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT LOUIS PANETTI,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

## RESPONDENT'S BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the lower court properly held that Panetti was competent to be executed after finding that Panetti knew that he was to be executed and factually aware of the reasons for his execution.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Scott Louis Panetti[1] unsuccessfully challenged the state court's determination that he was competent to be executed. In the court below, Panetti appealed the district court's determination that *Ford v. Wainwright*, 477 U.S. 399 (1986) did not preclude his execution. The court of appeals did not err in affirming the district court's judgment, however, and Panetti is not entitled to certiorari review.

## STATEMENT OF THE CASE

### I. Facts of the Crime

The Fifth Circuit summarized the facts of the offense in its opinion denying relief on Panetti's first habeas petition:

> About one month before the double murder for which he was convicted and sentenced to the death penalty, Panetti and his wife, Sonja separated due to Panetti's drinking and generally abusive behavior. Sonja took their three-year-old daughter and went to stay with her parents, Amanda and Joe Alvarado, a short distance away. The Alvarados told Panetti to stay away from their home and called the police at least once during Panetti's occasional visits there. Sonja obtained a protective order on September 2, 1992 which was ineffective in keeping Panetti away.
>
> On September 7, Panetti asked his friend, David Morquecho, to take his dog because he was going somewhere. They discussed the protective order Sonja had obtained and Morquecho told Panetti he had better stay away from Sonja and leave town for awhile. Panetti later got drunk and awaked early on the morning of September 8, 1992. He shaved his head and sawed off a shotgun. He donned camouflage "jungle" gear and "web gear" including a belt with knives. He took the shotgun and a 30.06 rifle with him and drove to the Alvarado's home.

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[1] Respondent Nathaniel Quarterman will be referred to as "the Director."

Panetti broke the glass in a sliding door near Sonja's bed with the shotgun, breaking the gun as well in the effort. He chased Sonja out of the house and confronted her in the front yard. He disappeared momentarily, allowing Amanda Alvarado to shepherd Sonja back inside and to lock the front door. Panetti then came after Sonja, her mother, and her father, Joe, who was then also present. Panetti cornered Mr. and Mrs. Alvarado in the kitchen with Sonja in the adjoining hallway. He asked Sonja who she wanted to see die first - her or her parents. He then yelled at Mr. Alvarado that he had told Panetti not to come around anymore, and at close quarters, shot him in the chest with the 30.06 rifle, killing him. Sonja realized that their three year-old daughter had entered the hallway. Despite Sonja's begging Panetti not to kill her mother, Panetti repeated to Mrs. Alvarado what he had said to Mr. Alvarado, pressed the rifle against her chest, and shot her. Sonja and her daughter were sprayed with Mrs. Alvarado's blood.

Sonja begged Panetti not to shoot her or take her daughter and Panetti responded that his rifle was jammed. He took the two of them back to the bunkhouse where he had been living, had them wash the blood off of themselves, and gave them fresh clothes. When Sonja asked to be allowed to go check on her parents, Panetti responded, "I just shot your parents. No more mommy, no more daddy; get that through your head." He told her that she and her parents had betrayed him and forced her to read aloud the language of the protective order, repeating herself each time she skipped a part. He reloaded the 30.06 rifle.

He made Sonja lie on the bed with her daughter while he talked to her about "what I've done to you," generally about what people would think of him, and that he had only wanted to provide for Sonja and her daughter. At her request, he then let her go and suggested he might shoot it out with the police until he was killed. He was later apprehended.

*Panetti v. Cockrell,* No. 01-50347, slip op. at 2-4 (5th Cir. 2003).

## II. Prior Appeals and Habeas Proceedings

Panetti was convicted and sentenced to die for the 1992 murders of his in-laws,

Amanda and Joe Alvarado. 1 Tr 8; 7 Tr 1040-1044.[2] The Texas Court of Criminal Appeals affirmed Panetti's conviction and sentence and the United States Supreme Court denied certiorari review. *Panetti v. State*, No. 72,230 (Tex. Crim. App. Dec. 3, 1997), *cert. denied*, 525 U.S. 848(Oct. 5, 1998). Panetti's state application for writ of habeas corpus was later denied by the Court of Criminal Appeals based upon the trial court's findings of fact and conclusions of law. *Ex parte Panetti*, No. 37,145-01 (Tex. Crim. App. May 20, 1998).

Panetti then filed a petition for federal habeas relief, which was denied by the district court on March 9, 2001. *Panetti v. Johnson*, No. 99-CV-260 (W.D. Tex. 2001). In a separate order the district court granted a certificate of appealability ("COA") on six of Panetti's claims. The Court denied Panetti's request for a COA on the remaining seven claims, *Panetti v. Cockrell*, No. 01-50347 (5th Cir. Jun. 11, 2002), and affirmed the district court's denial of federal habeas relief, *Panetti v. Cockrell*, No. 01-50347 (5th Cir. June 19, 2003). Panetti's subsequent petition for writ of certiorari was denied by the Supreme Court on December 1, 2003. *Panetti v. Dretke*, 540 U.S. 1052 (2004).

**III. Competency Proceedings**

After Panetti's execution was scheduled for February 5, 2004, Panetti filed a motion with the trial court to determine his competency to be executed under Article 46.05 of the Texas Code of Criminal Procedure. The trial court denied that motion without holding a hearing, finding that Panetti failed to make a substantial showing of incompetence.

On January 26, 2004, Panetti filed a motion for stay of execution and a federal habeas petition in the district court below, alleging that *Ford v. Wainwright*, 477 U.S. 399 (1986), prohibited his execution. The court initially denied Panetti's request for a stay, but ultimately

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[2] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, preceded by volume number and followed by page numbers.

granted the motion to allow Panetti the opportunity to present these new allegations to the state court after Panetti submitted new factual allegations relevant to his present mental condition. *Panetti v. Dretke*, No. 04-CA-042 (W.D. Tex. 2004).

Upon his return to state court, two experts, Dr. George Parker and Dr. Mary Anderson, were appointed to evaluate Panetti and determine whether he was competent under article 46.05. Drs. Parker and Anderson filed a joint report with the court concluding that, based on their evaluation, Panetti was competent to executed. On May 26, 2004, based upon this report and without holding a live hearing, the state court again concluded that Panetti failed to show that he was incompetent to be executed.

When Panetti's federal proceedings resumed, the district court denied the Director's motion to dismiss Panetti's petition as successive under 28 U.S.C. § 2244, granted Panetti's motions for appointment of counsel, discovery, and funds for expert and investigative assistance, and set an evidentiary hearing for September 7-8, 2004. Following the hearing, the court issued an opinion denying relief on Panetti's *Ford* claim, finding that he was competent to be executed. The court then granted a COA to determine whether the court correctly determined that the standard for competency in this circuit required "the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." Panetti filed timely notice of appeal. Appendix at 25-27. The Fifth Circuit affirmed the district court's decision on May 9, 2006 *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006). The instant petition followed.

## IV. Fact Relating to Competency

The district court summarized the facts introduced below at the evidentiary hearing relating to Panetti's competency to be executed:

> Counsel for [Panetti] presented the testimony of four expert witnesses:

Dr. Mary Alice Conroy, a clinical and forensic psychologist; Dr. Susan Rosin, a clinical psychologist; Dr. Seth Silverman, a psychiatrist; and...Dr. Cunningham. The State presented two expert witnesses, Dr. Parker and Dr. Anderson, appointed to evaluate Panetti by the state habeas court, and three fact witnesses, Major Steve Miller, Lieutenant Terri Hill, and Victoria Williams, TDCJ corrections officers who have had the opportunity to observe Panetti at his place of incarceration, to varying degrees in recent months and years. All of the expert witnesses based their testimony on their respective meetings with Panetti, interviews with people that know him, and Panetti's medical and custodial records.

The expert witnesses, on both sides, seemed to agree Panetti suffers from some form of mental illness. They disagreed, however, about the extent (and diagnosis) of his illness as well as the extent his illness interferes with his ability to understand the reason for his impending execution. Certain facts may be regarded as established, however. First, the testimony of the witnesses in sum, supports a finding that Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. Although Dr. Parker and Dr. Anderson concluded that some portion of Panetti's behavior could be attributed to malingering, their testimony merely causes doubt as to the extent of Panetti's mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

Each of the expert witnesses weighed in on his or her view of Panetti's understanding of the fact he is to be executed and the reason for it. All agreed Panetti understands he is going to be executed and, at least implicitly, they agreed he is capable of understanding that fact. Despite their converging points of views on this basic point, their opinions diverged on a number of other points.

There was disagreement among Panetti's own witnesses about whether Panetti has an understanding of the murders he committed. Dr. Conroy stated Panetti would say almost nothing about the subject, and what he did say came across as rather garbled. Nonetheless, she was able to testify, "he seemed to be saying that God had nullified it, God had forgiven him, God had wiped the

slate clean - in fact he uses the phrase wiped the slate clean - and it would be sinful to talk about that because its no longer an issue." Dr. Rosin testified somewhat more clearly Panetti knows he killed his wife's parents, basing her conclusion on details of the murders that he went over with her during their meeting. Dr. Silverman testified, on the other hand, that Panetti told him he believed another individual named Sarge committed the murders of his in-laws, and Panetti took no responsibility for them. Dr. Silverman also indicated he did not find it unusual for three different people asking the same questions to get three different answers from someone with Panetti's condition.

The witnesses further disagreed about whether Panetti understands the reason he is being executed. Significantly, no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed. Dr. Parker and Dr. Anderson both testified Panetti has the capacity to understand this fact but were unable to reach a formal conclusion that he did, in fact, understand it. Their inability to reach this formal conclusion apparently can be largely attributed to the fact that Panetti did not tell them he understood he was to be executed for committing the murders during their interview with him. Dr. Parker and Dr. Anderson based their view that Panetti is capable of understanding the reason for his execution on their determinations about his cognitive functionality generally. For example, Dr. Parker testified that in letters Panetti writes to friends and family, he often communicates lucid, socially appropriate thoughts. Dr. Anderson testified that although many of Panetti's responses to her questions in their meeting were abstract and indirect, she regarded them as logical. She further stated Panetti's "capacity to understand the Bible, to understand history, movies, other things that he referenced, tell me he has the capacity to understand the facts of why he's being executed." The observations of Major Miller, Lieutenant Hill, and Ms. Williams corroborate Dr. Parker's and Dr. Anderson's view that at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion.

The witnesses for Panetti did not dispute that he has the cognitive functionality to communicate coherently much of the time. Their testimony about his condition was that, despite the fact that he can think and communicate coherently about certain subjects and in certain environments, he suffers from delusions about the world around him. Significantly, they testified he suffers from the delusion that the real reason for his execution is his preaching the Gospel. Dr. Conroy testified Panetti believes his execution is part of a "spiritual warfare" which had been going on since the 1980s.

> Dr. Conroy and Dr. Rosin both testified, despite his delusions, Panetti understands the State's stated reason for seeking his execution is for his murders. They based this testimony on what Panetti told them in their meetings with him. Ultimately both concluded, however, that Panetti does not appreciate the connection between his crimes and his execution. They apparently reached this conclusion from the premise that, as a result of his delusions of persecution, he disbelieves the State's stated reason for executing him. Dr. Silverman testified that in his view, Panetti does not associate his execution with the murders he committed in any way. This view was informed, however, at least in part, by the fact that Panetti did not specifically tell Dr. Silverman he understands the State's stated reasons for seeking his execution.
>
> Dr. Cunningham testified, although Panetti understands that the State of Texas is going to execute him, his delusions prevent him from recognizing the State as "a lawfully constituted authority." Rather, according to Dr. Cunningham, Panetti sees the State "as being in league with the forces of evil to prevent him from preaching the Gospel."

*Panetti v. Dretke*, No. 04-CA-042 at 14-18 (W.D. Tex. Sept. 29, 2004).

## ARGUMENT

### I. The Question Presented for Review Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Panetti advances no compelling reason in this case, and none exists. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (West 2005).

This Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); *Williams*, 529 U.S. at 411. As the Court recently explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications

> of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

*Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Finally, it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

The Director argued on appeal below that the district court erred in failing to apply the deferential standard of reviewing required by the AEDPA. *See* Appendix A at 3. The Fifth Circuit found that because it affirmed to ultimate judgment of the district court finding Panetti competent to be executed, it need not decide whether this was error. *Id.* The director continues to assert that the factual findings by the state court that Panetti was competent to be executed, is entitled to deference on federal habeas review regardless of whether a hearing was held.

## II. The Court of Appeals Correctly Determined that Panetti Was Competent to be Executed.

Certiorari review is not warranted in this case because the Fifth Circuit's decision is entirely consistent with Eighth Amendment principles as set out in *Ford*. Panetti's argument that the lower court erred in failing to properly apply the standard articulated Justice Powell

in his *Ford* concurrence is not persuasive. Contrary to Panetti's assertion, however, the court of appeals correctly applied Powell's standard in determining that the Eighth Amendment did not bar Panetti's execution. Accordingly, Panetti's complaint here has no merit.

In *Ford*, this Court held the Eighth Amendment prohibition against cruel and unusual punishment precludes the execution of the insane. The Court reasoned that,

> [f]aced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

*Ford*, 477 U.S. 409-10. This plurality opinion did not, however, announce a standard by which to assess an individual's competency to be executed. *See Ford*, 477 U.S. at 418 (Powell, J., concurring). Justice Powell took up this task in his concurrence. Citing the Florida statute which required the Governor to stay executions of those individual "who do not have the mental capacity to understand the nature of the death penalty and why it was imposed on them," Powell explained,

> Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution of only those who are unaware of the punishment they are about to suffer and why they are about to suffer it.

*Ford*, 477 U.S. at 421-22.

The federal district court in this case found that Panetti was competent to be executed because evidence demonstrated that he knew 1) he committed two murders; 2) he will be

executed; and 3) the reason the State has given for that execution is his commission of those murders. Appendix A at 4. The issue on appeal to the Fifth Circuit was whether Panetti's understanding of the State's reasons for his execution was sufficient to meet the requirement that he understand the reasons for his execution. *Id.* After a lengthy discussion of circuit precedent which adopted and applied Justice Powell's *Ford* standard, the Fifth Circuit concluded that the district court's findings were sufficient to establish that Panetti is competent to be executed "[b]ecause we hold that 'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding,' as argued by Panetti." Appendix A at 9.

Panetti contends that the lower court erred in its application of Justice Powell's standard. He argues that Fifth Circuit jettisoned Powell's retributive rationale by requiring only a factual awareness to satisfy the Eighth Amendment protection. Panetti insists that the moral force of retribution is lost in an inmate believe that his execution is being carried out because of a conspiracy of demonic forces rather than as lawful punishment for a horrific crime. He further maintains that society does not get the full benefit of retribution if an individual is executed under these circumstances. Petition at 31.

Initially, this argument fails because the retributive goal was satisfied in this instance. Justice Powell stated in his opinion that the retributive goal of the criminal law is satisfied where the defendant perceives the connection between his crime and his punishment. *Ford*, 477 U.S. at 422. The evidence produced during the evidentiary hearing in district court demonstrates that Panetti was able to perceive the connection between his crime and his punishment.

One of Panetti's experts, Dr. Rosin, testified that Panetti knew he had killed his wife's parents. Another of his experts, Dr. Conroy, testified that Panetti "seemed to be saying that

God had nullified it, God had forgiven him, God had wiped the slate clean - in fact he uses the phrase wiped the slate clean - and it would be sinful to talk about that because its no longer an issue." *Id.* at 10. Dr. Conroy and Dr. Rosin further testified that, despite his delusions, Panetti understands that the State's stated reason for seeking his execution is the murders of his in-laws. *Id.* at 11.

Based on this evidence, it is clear that Panetti is able to "perceive the connection" between his crime and his punishment. Panetti's delusional belief that there is a deeper hidden, meaning behind his execution - the State's attempt to prevent him from preaching the gospel - does not change the fact that Panetti nonetheless understands that the State is executing him because he killed his wife's parents. As such, any retributive goal requirement that might exist under Powell's *Ford* standard was satisfied in Panetti's case.

Panetti's "rational understanding" requirement reads too much into Justice Powell's opinion. Prior to *Ford*, decisions by this Court required a factual *and* rational understanding of the nature of the pending proceedings before a defendant could be deemed competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402 (1960). Powell even discussed the *Drope* standard in rejecting the notion that competency to be executed required a finding that a defendant be able to assist in his own defense. He reasoned that such a requirement would "give too little weight to the State's interest in finality." *Ford*, 477 U.S. at 421 n. 422. Thus, a clear distinction exists between the level of competency required to stand trial and that required to be executed.

Moreover, none of the five federal circuit courts that have addressed the issue of competency to be executed under *Ford* appear to have imposed a "rational understanding" requirement. *See Scott v. Mitchell*, 250 F.3d 1101, 1014 (6th Cir. 2001) (concluding that an individual who does not understand the nature of the death penalty and why it was imposed

upon him is incompetent to be executed); *Massie v. Woodford*, 244 F.3d 1192, 1195 n. 1 (9th Cir. 2001) (citing *Ford* for the proposition that "the Eighth Amendment forbids the execution of only those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) (recognizing that the *Ford* standard requires only that an individual "know the fact of his impending execution and the reason for it"); *Rector v. Clark*, 923 F.2d 570, 570 (8th Cir. 1991) (stating that *Ford* requires the examination of two factors 1) whether the individual understands that he is to be executed; and 2) whether the individual understands why he is being punishment). *Walton v. Johnson*, 440 F.3d 160, 170-71 (4th Cir. 2006) (holding that the test for competency is Justice Powell's *Ford* standard which prohibits the execution only where the individual in unaware of the punishment and why they are about to suffer it).

Indeed, three of the five circuit courts have specifically refused to expand or read further into the standard set out by Justice Powell. *See Bernard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994) (finding that petitioner was competent despite the fact that his perception of the reason for his conviction and pending execution were at times distorted by a delusion belief that everything negative that happens to him was the result of a conspiracy of Asians, Jews, Blacks, and homosexuals, because "Barnard knew that he was going to be executed and why he was going to be executed – precisely the finding required by the *Ford* competency standard"); *Coe v. Bell*, 209 F.3d 815, 826 (6th Cir. 2000) (rejecting the notion that an individual's ability to assist in his own defense was a requirement for determining competency to be executed); *Walton*, 440 F.3d at 170-173 (refusing to expand the competency standard to include a requirement that the individual be able to prepare for his own passing).

As explained in *Bell* and by Justice Powell in *Ford*, competency to be executed

involves different interests than competency to stand trial. Thus, the requirements for the former are not as rigid as those for the latter. For the reasons stated above the circuit court correctly determined that the Eighth Amendment did not prohibit Panetti's execution.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that Holiday's petition for writ of certiorari be denied.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**October Term, 2005**

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**SCOTT LOUIS PANETTI,**

**Petitioner,**

**V.**

**NATHANIEL QUARTERMAN,**
**Director, Texas Department of Criminal Justice,**
**Correctional Institutions Division,**

**Respondent.**

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# *RESPONSE TO STATE'S BRIEF IN OPPOSITION*

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**CAPITAL CASE**

## QUESTION PRESENTED

DOES THE EIGHTH AMENDMENT PERMIT THE EXECUTION OF A DEATH ROW INMATE WHO HAS A FACTUAL AWARENESS OF THE REASON FOR HIS EXECUTION BUT WHO, BECAUSE OF SEVERE MENTAL ILLNESS, HAS A DELUSIONAL BELIEF AS TO WHY THE STATE IS EXECUTING HIM, AND THUS DOES NOT APPRECIATE THAT HIS EXECUTION IS INTENDED TO SEEK RETRIBUTION FOR HIS CAPITAL CRIME?

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Respondent.

*RESPONSE TO STATE'S BRIEF IN OPPOSITION*

Petitioner Scott Louis Panetti files this response to the State's Brief in Opposition.

## I. THE STATE COURT DECISION IS NOT ENTITLED TO AEDPA DEFERENCE.

The State argues that AEDPA required the District Court to defer to the state court's decision that Mr. Panetti had failed to show by a preponderance of the evidence that he was incompetent to be executed. State's Brief in Opposition at 9. The Fifth Circuit did not address this issue because it upheld the District Court's ultimate conclusion that Ford does not demand a condemned inmate to possess a rational understanding of the reasons for his impending execution. Panetti v. Dretke,

448 F.3d 815, 817 (5th Cir. 2006). However, the District Court correctly decided the issue. Ford's constitutional due process requirements for determining execution competency trump AEDPA. After Mr. Panetti made a substantial showing of incompetency under Article 46.05 of the Texas Code of Criminal Procedure, the state court's refusal to allow him to present psychiatric evidence that differed from the conclusions of the court-appointed experts did not comply with the minimal procedural due process guarantees of Ford.

Seven Justices in Ford expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law required the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. Ford v. Wainwright, 477 U.S. 399, 412 (1986). After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. Id. If the Governor concluded that the inmate was competent, he issued a death warrant. Id. at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. Id.

Although the seven Justices, in three separate opinions, could not agree on the minimum level of process required by the Constitution, all were troubled by the procedural inadequacies of Florida's competency determination. Justice Marshall, joined by three other members of this Court, found the Florida procedure constitutionally inadequate because it precluded the condemned inmate or his counsel from presenting relevant information to the factfinder or participating in the competency determination in any adversarial manner. Id. at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) Recognizing that the probability of making a reliable decision

increases when the factfinder can consider differing psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the factfinder loses the substantial benefit of potentially probative information." Id.

Justice Marshall noted that a related defect in the Florida procedure stemmed from the prisoner's inability to challenge, clarify, or impeach the findings of the state-appointed psychiatrists through cross examination or a less formal method. Id. at 415. He emphasized the important role that questioning the experts serves, because it:

> would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts, concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent.

Id. (citation omitted).

Justice O'Connor also recognized that the Florida procedures for determining competency were constitutionally inadequate. She believed that Florida's failure to permit counsel for the inmate to participate in the competency determination and the Governor's exclusion of all advocacy from the parties involved violated the bedrock due process principle of the opportunity to be heard. Id. at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.).

Like Justice O'Connor, Justice Powell noted that the Florida procedures for determining competency did not comport with the fundamental fairness that is "the hallmark of the procedural protections afforded by the Due Process Clause." Id. at 424 (Powell, J., concurring in part and

concurring in the judgment). Focusing on the fundamental requisite of due process – the opportunity to be heard – Justice Powell concluded that the Florida procedures did not afford the petitioner that opportunity. Id. Because the Florida statute did not require the Governor to review materials that the prisoner submitted, Justice Powell concluded that:

> [T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id.

Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." Id. at 427. Justice Powell refused to apply the presumption of correctness to the state court's findings, because he concluded that the Florida procedures violated both the Due Process Clause and the pre-AEDPA version of 28 U.S.C. § 2254(d)(2) requiring "a full and fair hearing" in state court. Id. at 424. He noted that the statutory hearing prerequisite "is no different from the protection afforded by procedural due process." Id.

In Mr. Panetti's case, the District Court adhered to Justice Powell's reasoning. The District Court explained, "[b]ecause the Court's holding in Ford was grounded in part in the Constitution, subsequent changes to the habeas statute should not alter its determination that no deference may be afforded to state court competency-to-be-executed proceedings resulting in a denial to the petitioner of an effective right to participate." Panetti v. Dretke, 401 F. Supp.2d 702, 706 (W.D. Tex. 2004). Ford's constitutionally-grounded procedural due process holding overrides the Fifth Circuit's

decision in Valdez v. Cockrell, 274 F.3d 941, 946 (5th 2001), which held that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme." See Panetti, 401 F. Supp. 2d at 706 ("[T]here is no reason to believe that the Fifth Circuit intended to hold the AEDPA somehow overruled the Supreme Court's constitutional holding in Ford."). In short, the District Court correctly decided to hold an evidentiary hearing, grant funds so that Mr. Panetti could hire his own experts, and conduct de novo review of the execution competency claim.

## II. THE ABSENCE OF AN ASSISTANCE PRONG DOES NOT MEAN THAT THE EXECUTION COMPETENCY STANDARD LACKS THE ELEMENT OF RATIONAL UNDERSTANDING.

The State contends that the lack of an assistance prong for determining execution competency means that Justice Powell rejected the "rational understanding" component found in the trial competency standard of Dusky v. United States, 362 U.S. 402 (1962). State's Brief in Opposition at 12. Contrary to the State's arguments, the ability to assist counsel is not a proxy for rational understanding. If it were, then this Court would not require a petitioner to possess a rational understanding of the consequences of his decision to waive habeas review – a stage of the criminal proceedings past the point of finality and the right to constitutionally-mandated assistance. See Rees v. Peyton, 384 U.S. 312, 314 (1966) (holding that the standard for competency to waive collateral review requires the court to determine whether the petitioner has "the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises"). Justice Powell refused to include an assistance prong in his execution competency standard, not because he did not want the standard to contain a component of rational understanding, but because requiring assistance at that late stage "would give too little weight to the State's interest in finality." Ford v. Wainwright, 477 U.S. 399, 421 n.2 (1986) (Powell, J., concurring in part and concurring in the judgment).

The unitary competency standard discussed in Godinez v. Moran, 509 U.S. 389 (1993), strengthens the proposition that Justice Powell's standard must contain a rational understanding component even in the absence of an assistance prong. Godinez held that the competency standard for pleading guilty or for waiving the right to trial is the same as the Dusky standard for determining competency to stand trial. Id. at 398. This Court noted that "[t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ***ability*** to understand the proceedings." Id. at 401 n.12 (emphasis in original). In a concurring opinion, Justice Kennedy wrote that "[t]he Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings." Id. at 404 (Kennedy, J., concurring in part and concurring in the judgment). He concluded that "[c]ommentators have agreed that the common-law standard of competency to stand trial, which parallels the Dusky standard, has been applied throughout criminal proceedings, not just to the formal trial." Id. at 407.

This Court originally designed the Dusky standard to protect the constitutional due process rights of a defendant who has not yet been tried, convicted, or sentenced. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996). However, Godinez also equated Rees's "rational choice" language with Dusky's "rational understanding" component, finding that the same level of understanding for competency to stand trial applies to a condemned prisoner who wishes to waive collateral review. 509 U.S. at 398 n.9. Such a prisoner no longer enjoys the protection of the same constitutional rights at issue in the Dusky context, because he has already been validly convicted and sentenced to death. See Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (noting that habeas review is a "secondary and limited"component of the criminal justice process). At this stage, the State acquires a substantial and legitimate interest in finality, in taking the prisoner's life as punishment for the crime. Nevertheless, Godinez recognized that the rational understanding component is the same as Dusky's. The Rees standard differs from Dusky only in that Rees does not require an ability-to-assist-counsel

prong – not because a habeas petitioner need possess only a factual, rather than a rational, understanding of the proceedings, but because a habeas petitioner no longer has a constitutional right to the assistance of counsel. Although the specific factual inquiries for determining competency differ depending on the stage of the criminal proceedings, Godinez emphasizes that courts must assess the answers to those inquiries within the framework of rational understanding. See, e.g., Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000) ("While [the Dusky] standard differs from the Rees competency standard at issue in this case ('capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation'), both standards inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue")

## CONCLUSION

The Fifth Circuit's interpretation and application of Ford does not protect the truly insane from being executed. The Court should grant certiorari.

Respectfully submitted,

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In The

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v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

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## I. THE STATE COURT'S COMPETENCY DETERMINATION IS NOT ENTITLED TO DEFERENCE UNDER AEDPA, BECAUSE IT INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND WAS REACHED THROUGH PROCEDURES HELD UNCONSTITUTIONAL IN *FORD*.

The state trial court's decision that Petitioner Scott Louis Panetti is competent to be executed is entitled to no deference under AEDPA. The State's arguments to the contrary are wrong for two reasons. First, the state court's determination involved an unreasonable application of clearly established federal law – specifically, this Court's procedural due process ruling in *Ford v. Wainwright*, 477 U.S. 399 (1986). Second, AEDPA cannot plausibly be read to require federal courts to defer to state court factual findings made through a process that this Court has held is inconsistent with the minimum constitutional requirements for a fair hearing.

### A. A state court decision that departs markedly from this Court's established procedures for adjudicating a federal claim is entitled to no deference.

AEDPA is explicit that state court rulings do not bind the federal judiciary when they involve "an unreasonable application" of this Court's settled constitutional law. 28 U.S.C. § 2254(d)(1). In this case, *Ford* is the source of that settled law. Justice Powell spelled out the minimum due process requirements for a competency determination in his concurring opinion. *See Marks v. United States*, 430

U.S. 188, 193 (1977).[1] Although articulated in the specific context of the Florida competency scheme before the Court, *Ford* clearly establishes the constitutional inadequacy of the procedure used to find Mr. Panetti competent.

Justice Powell succinctly reasoned that, because Florida's process did not "provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," Alvin Ford's competency "was not adjudicated fairly within the meaning of due process." *Ford*, 477 U.S. at 427. He explained this conclusion in terms equally applicable here:

> [T]he determination of petitioner's sanity appears to have been made ***solely*** on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process.

*Id.* at 424 (emphasis in original).

In Mr. Panetti's case, the trial court denied his counsel the opportunity to respond to the court's experts with expert psychiatric evidence that explained the inadequacies of their evaluation and refuted their results. Mr. Panetti's counsel had supported his request for a competency determination under Article 46.05 by presenting a report from Dr. Mark Cunningham, JA 108-10, a forensic psychologist who agreed *pro bono* to interview Mr. Panetti two days before his scheduled execution in 2004. Dr.

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[1] Justice Marshall's plurality opinion in *Ford* would have required still more extensive procedures for a competency determination. *See* 477 U.S. at 410-18.

Cunningham's report formed a part of counsel's initial submission that resulted in a stay of execution and the state court's appointment of two mental health experts. JA 59. However, the state court denied counsel's request for funds for a more extensive evaluation of Mr. Panetti, *see* JA 96-97, and the court made its determination of competency solely on the basis of the joint written report of its two examiners. The finding of competency was based largely, if not entirely, on the experts' belief that Mr. Panetti was malingering. They characterized his behavior as obstructionist when he would not answer their questions, because they refused to tell him whether they were Christians. JA 71-72; *see* JA 70, 75 (describing Mr. Panetti as "filibustering about the Bible and the Lord," and concluding that he "consciously chose not to answer our interview questions" but rather "deliberately and persistently chose to control and manipulate our interview situation," and "chose not to discuss the reason he is to be executed").

This interpretation of Mr. Panetti's behavior introduced a new and decisive element into the evaluation. Therefore, it was imperative that Mr. Panetti's counsel have a meaningful opportunity to criticize and contest that opinion through "contrary medical evidence." *Ford*, 477 U.S. at 424. Although counsel did submit objections to the experts' report, JA 79-95, he "d[id] not possess any expertise in the field of mental illness," JA 79, and was therefore "at a severe disadvantage in reviewing the adequacy and reliability of the procedures used and the conclusions reached by the court-appointed experts." JA 96. Dr. Cunningham's evaluation could not serve to challenge the experts' conclusion that Mr. Panetti was malingering, because Dr. Cunningham had interviewed him months before those experts filed their report. He could not have addressed the issue of whether Mr. Panetti's fixation on the experts' religious beliefs was malingering or a product

of his psychotic delusion that he was being put to death to stop him from preaching the Gospels.[2]

It was crucial that counsel for Mr. Panetti have the opportunity to refute the court's experts by obtaining and presenting "expert psychiatric evidence that may differ from the State's own." *Ford*, 477 U.S. at 427. As the District Court concluded, "it was exactly this ability to present his own evidence and refute the state-appointed psychiatrists' opinions that Panetti was denied." JA 133. The denial was a gross deviation from the due process requirements that *Ford* established for a competency determination and was, therefore, an unreasonable application of *Ford*.[3]

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[2] Forensic mental health experts can use a number of increasingly reliable tests to detect malingering. *See, e.g.*, Richard Rogers & Daniel Shuman, *Conducting Insanity Evaluations* (2000); Richard Rogers, *Clinical Assessment of Malingering and Deception* (2d ed. 1997); John V. Jacobi, *Fakers, Nuts, & Federalism: Common Law in the Shadow of the ADA*, 33 U.C. Davis L. Rev. 95, 122 (1999).

[3] This Court held in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), that a state court decision involves an unreasonable application of clearly established federal law under Section 2254(d)(1) if it deviates markedly from the procedure established by this Court's precedents for adjudicating the federal claim at issue.

In *Williams*, the Court held that the Virginia Supreme Court's adjudication of an ineffective assistance of counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). 529 U.S. at 396-98. The state court had found that defense counsel's failure to discover and present mitigating evidence was not prejudicial under *Strickland*, because the undeveloped evidence merely showed that "numerous people, mostly relatives, thought that [Williams] . . . was nonviolent and could cope very well in a structured environment." *Id.* at 372 (internal quotation marks omitted). This Court held that finding unreasonable under Section 2254(d)(1) "insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Id.* at 397-98; *see id.* at 416 (O'Connor, J., concurring) (agreeing that the

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### B. AEDPA cannot sensibly be read to require federal courts to defer to state court factual findings made through procedures that violate the minimum due process requirements established by *Ford*.

Settled principles of statutory construction preclude an interpretation of AEDPA that would require a federal court to defer to competency findings made in state court proceedings that flouted *Ford*'s procedural due process holding. Because *Ford* defined the minimally acceptable procedures for a constitutional competency determination, a construction of AEDPA that compels federal courts to accept factual findings made in violation of those procedures would raise serious constitutional questions. Such an interpretation would breach a cardinal rule of statutory construction.

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Virginia Supreme Court's decision involved an unreasonable application of clearly established federal law because it revealed "an obvious failure to consider the totality of the omitted mitigating evidence"). In short, the state court's failure to follow the procedure that this Court had prescribed for the prejudice inquiry made the state court's adjudication of the ineffective assistance claim objectively unreasonable.

Similarly, in *Wiggins*, the Court held that the decision of the Maryland Court of Appeals was an unreasonable application of clearly established federal law because the Maryland court had failed to conduct the searching factual inquiry required by *Strickland*. 539 U.S. at 528. The state court did not assess whether the trial lawyers demonstrated reasonable professional judgment in deciding to end their mitigation investigation after obtaining Wiggins's presentence investigation report and childhood social services records. *Id.* at 527. Instead, the state court "merely assumed that the investigation was adequate." *Id.* After conducting the examination of the records that the state court should have performed, this Court found that trial counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. Consequently, the Maryland court's "assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*." *Id.* at 528.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court will adopt the constitutional construction, *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909), "unless [it] is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In passing AEDPA, Congress intended to "give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 404 (internal quotation marks omitted). Congress presumably expected state courts to make their findings through procedures that complied with the law of the Due Process Clause.[4] *Ford* plainly held that one-sided competency proceedings that provide no effective opportunity for the prisoner's counsel to challenge the decisionmaker's experts with contrary mental health evidence violate due process. Congress cannot plausibly be supposed to have intended federal courts to defer to findings of fact made in such proceedings.

## II. THE STATE MISREPRESENTS MR. PANETTI'S PROPOSED STANDARD OF COMPETENCY AS BASED ON THE CONDEMNED'S SUBJECTIVE, WILLFUL BELIEFS ABOUT THE REASON FOR HIS EXECUTION RATHER THAN ON HIS COGNITIVE CAPACITY.

By repeatedly mischaracterizing the standard of competency invoked by Mr. Panetti, the State attempts to seed the fear that "vast numbers" of death row inmates will manipulate the standard and postpone their executions. Respondent's Brief at 41. The State describes the

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[4] Congress doubtless understood that a state court's disregard of clearly established procedural due process requirements would trigger the exception to deference spelled out in Section 2254(d)(1).

proposed standard as one based on "will" rather than "capacity," and thus makes it appear to be ripe for abuse: "[A]ny execution-competence standard *not* phrased in terms of capacity would be readily susceptible to circumvention by lies or noncooperation." *Id.* at 42 (emphasis in original). Contrary to the State's assertions, Mr. Panetti has consistently argued for a standard that forbids the execution of "a person who, because of a severe mental impairment, is *incapable* of rationally understanding the reason for his execution." Petitioner's Brief at 30 (emphasis added).[5]

Mr. Panetti's standard is not keyed to the "innermost thoughts of capital convicts," so as to provide them with a "remarkably easy" way to "feign [their] way out of a death sentence," nor does it "prevent the execution of convicts who genuinely lack moral qualms about their crimes." Respondent's Brief at 46. The test that Mr. Panetti urges involves three distinct inquiries into the prisoner's mental functioning:

1. Does the inmate have an irrational belief about the reason for his execution?
2. If so, does the inmate suffer from a mental illness or mental impairment?

[5] The State also contends that an execution competency standard containing a rational understanding component is unnecessary, because a condemned inmate, unlike a capital defendant, has "no significant strategic choices" left to make. Respondent's Brief at 38. This may be so, but it misses the main thrust of the *Ford* Court's reasoning in constitutionalizing the common-law ban: that the rule against executing incompetent persons is designed not only to protect them from a punishment whose significance they cannot comprehend, but also to "protect the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410.

3. If so, does the mental illness or mental impairment render him incapable of rationally understanding the connection between his crime and his punishment?

The State erroneously argues that the proposed test for competency involves only the first step. However, the first step simply puts counsel on notice that additional inquiry is necessary if the inmate's stated reason for his execution is not sufficiently grounded in reality.[6] The second step demands a finding of mental illness or impairment, and the third step requires that the inmate's mental illness or impairment be the cause of his inability to rationally understand his predicament. An inmate who is not mentally ill but only manipulative will falter on step two. An inmate who is mentally ill, but whose illness is not the source of his irrational beliefs, will falter on step three. A schizophrenic inmate who suffers from a psychotic delusion that he is receiving secret-coded radio messages about world events from the president will falter on step one. Not all delusions are the same; not all schizophrenics are incompetent to be executed. The State's fears are chimerical.

Examining the case of a person who firmly believes he is innocent and is being executed only because he had abysmal representation should eliminate doubts about the ability of this standard to weed out frivolous claims. Such a person could possibly be diagnosed as having Antisocial Personality Disorder ("ASPD"). The essential feature of

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[6] Courts applying the test announced in *Dusky v. United States*, 362 U.S. 402 (1960), have concluded that "a sufficient contact with reality [is] the touchstone for ascertaining the existence of a rational understanding." *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1992); *see, e.g., In re Heidnik*, 112 F.3d 105, 112 (3d Cir. 1997) (holding that petitioner was incompetent to waive collateral review, because his decision to give up his appeals "is based on his delusional perception of reality – and has no rational basis").

ASPD is "a pervasive pattern of disregard for, and violation of, the rights of others." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701 (4th ed. text rev. 2000). One of the main features of ASPD is "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." *Id.* at 706. Unlike schizophrenia, not a single feature of ASPD involves delusions or other symptoms indicating profound distortions in thought or perception. *See id.* Lacking the kind of cognitive deficits that constitute the diagnostic criteria for schizophrenia, a person with ASPD would have no basis for claiming any *inability* to rationally perceive the connection between his crime and his punishment. In any event, such a person would ordinarily fail to meet step one of the proposed test, let alone steps two and three.[7]

The State also expresses concern about the inherent uncertainties and risks that *Ford* claims generally entail – that they are subject to conflicting diagnoses, mutable over time, and given to subjectivity. Respondent's Brief at 34. This concern is unwarranted in light of the procedures

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[7] The courts, with the assistance of mental health experts, should be able to distinguish between a psychotic delusion and a belief that is simply incorrect but not necessarily irrational. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1571 (11th Cir. 1995) ("[T]he opinion expressed by experts – that the delusions associated with race evidence the Defendant's delusional understanding of the nature of his execution and death – will not stand close scrutiny. The majority of persons on death row, in fact, are Black; and there are many persons who correctly or incorrectly believe that racial persecution is associated with the death penalty. For the Defendant to make such an assertion, although this Court does not find such an assertion to be factually well-founded, is not so highly irregular and inappropriate as to cause his understanding of his pending execution to be attributable to delusion."); *Schornhorst v. Anderson*, 77 F. Supp. 2d 944, 954-55 (S.D. Ind. 1999) (finding that petitioner's belief that his attorneys, the judge, and others had lied, and that his sentence was unfair did not undermine his sanity or even constitute a threshold showing of incompetence).

that the Court has suggested States may adopt "to control the number of nonmeritorious or repetitive claims of insanity." *Ford*, 477 U.S. at 417 (plurality opinion). The States may demand a "high threshold showing" of incompetency before requiring more elaborate procedures. *Id.* at 416-17 (plurality); *see id.* at 426 (Powell, J., concurring) (suggesting that the states "may require a substantial threshold showing of insanity merely to trigger the hearing process"). Texas's execution competency statute has adopted this suggestion. *See* Tex. Code Crim. Proc. art. 46.05(f) (requiring prisoner to make "a substantial showing of incompetency" before the trial court must appoint mental health experts). Even after the required showing has been made, Texas places the burden of persuasion upon the prisoner to show by a preponderance of the evidence that he is incompetent. Tex. Code Crim. Proc. art. 46.05(k). Texas deals with the potential problem of repetitive claims by requiring the prisoner to show "a substantial change in circumstances" after a previous finding of competency. Tex. Code Crim. Proc. art. 46.05(e). With provisions like these in place, the State's professed worries are unfounded.

## III. THE FACT THAT THE COMMON-LAW PRECEDENTS DO NOT PRECISELY DEFINE THE STANDARD FOR COMPETENCY TO BE EXECUTED DOES NOT MEAN THAT THE ANCESTRAL LEGACY OFFERS NO INSIGHT INTO THE PROPER EIGHTH AMENDMENT STANDARD.

The State argues that "the historical prong of the Eighth Amendment inquiry is ultimately unhelpful," Respondent's Brief at 21, because the common-law courts "could not avail themselves of the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry." *Id.* at 23 (internal quotation marks *omitted); see id. at 24 ("The vague formulations employed*

by eighteenth-century courts, lacking a clear taxonomy and uninformed by expert analysis, do not translate to *any* of the specific competence standards known to modern jurisprudence.") (emphasis in original). This contention is far too quick in dismissing the reasons our Anglo-American ancestors believed that the incompetent should not be executed. As the *Ford* Court recognized, the traditional common-law justifications still have relevance today and assist in giving definition to the Cruel and Unusual Punishments Clause. Although modern science has deepened our understanding of the nature, etiology, and symptoms of mental illness, we are no more sophisticated than our English forbears in understanding the relationship between desert and punishment or the capacity of the human mind to reach moral judgment. We turn our backs on the received wisdom of the common law at our peril. *See Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (plurality opinion) ("We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds.").

The State confuses the means to be used in deriving a constitutional standard with the methods for determining whether a particular individual meets that standard. The advances of medical knowledge over the centuries do not speak to the first question but only to the second. The appropriate standard for competency to be executed should ensure that the administration of the death penalty conforms to our society's legal and moral traditions. To formulate such a standard, we must take account of the purposes and limits of the law of crime and punishment and of the moral and utilitarian conceptions that inform the criminal law. Because these are moral constructs, not scientific ones, their understanding cannot be delegated to psychiatrists. On these matters, the eminent jurists and judges and moral philosophers of the seventeenth and eighteenth centuries were no less sophisticated than we

are today. We still rely on Coke and Blackstone for their propositions, insights, and understandings in scores of fields of law, including the criminal law.

In concluding that the Eighth Amendment imposes a ban on executing the incompetent, the *Ford* Court explicitly relied on the concerns that the English common-law jurists expressed about the impropriety of executing an offender who was not capable of comprehending the reason for his suffering. 477 U.S. at 406-10. The Court examined these ancient sources and found that many of their insights continued to have contemporary validity. *See id.* at 408-09 ("This ancestral legacy has not outlived its time."). In devising his test for execution competency, Justice Powell looked to "our common-law heritage" and found that its conceptions about cruelty and the lack of retributive value in executing the incompetent are not obsolete. *Id.* at 419 (Powell, J., concurring). His willingness to dispense with one of the common law's concerns emphasizes that he examined each of the others with care.[8] He found that "[t]he more general concern of the common law – that executions of the insane are simply cruel – retains its vitality;" that "[i]t is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death;" and that "today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." *Id.* at 421. Plainly, a majority of the Court in *Ford* did not share Texas's disdain for history.

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[8] Justice Powell concluded that the justification for "the prohibition against executing the insane" advanced by "some [common-law] authorities" – "as a way of preserving the defendant's ability to make arguments on his own behalf" – "has slight merit today" in the light of modern legal, not medical, practice. *Id.* at 420-21.

The evolution of medical knowledge is doubtless relevant in answering the question whether a specific individual meets the constitutional test of competency to be executed. Diagnostic techniques that did not exist at common law can assist psychiatrists and psychologists in detecting mental illness and determining the effects of the illness on an individual's mental functioning. Mental health professionals are more skilled than were our ancestors at making these diagnostic judgments. But that should only serve to give us confidence that we can more reliably determine which condemned inmates today meet a standard for competency that is consistent with our historic traditions. It provides no reason to sweep those traditions into the fire.

## IV. RETRIBUTION MUST FOCUS ON THE OFFENDER'S MENTAL CAPACITY AT THE TIME OF PUNISHMENT.

### A. Retribution demands that the offender suffer.

Mr. Panetti's opening brief observed that the community's need for retribution can be satisfied only if the condemned inmate suffers in anticipation of his approaching execution and rationally understands that he is being made to suffer for his capital crime. Petitioner's Brief at 44-47. Both the State and its *amicus curiae*, the Criminal Justice Legal Foundation ("CJLF"), take issue with this observation. They argue that the primary focus of retribution is society, not the offender, and that therefore a proper retributive analysis is not concerned with the offender's mental state at the time of punishment. Respondent's Brief at 43, 45-46; CJLF Brief at 6-10. Their assessment of

retribution's role is incorrect.[9] The deserved suffering of the offender comprises one of the fundamental principles of the retributive theory of punishment and is approved by the very sources CJLF uses to explain its understanding of retribution.

"Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim," *Roper v. Simmons*, 543 U.S. 551, 571 (2005), retribution demands that the offender suffer. Retribution is based on the idea that punishment serves primarily to exact from an offender the amount of suffering deemed proportionate to pay the "debt" owed society:

> The retributive position is an old one, and its content has not changed much over the centuries. It holds, very simply, that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones. . . .

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[9] CJLF states that it has found "no support for the notion that the perpetrator's mental state at the time of punishment is a major or even significant consideration in the retributive value of punishment." CJLF Brief at 6; *see id.* at 3 ("His guilt of the crime and deservedness of the punishment are sufficient to justify the punishment."). This statement is startling in light of this Court's determination that a perpetrator's inability to understand the retributive impact of his execution comprised one of the primary rationales for the common law's ban on executing the incompetent and one of the main reasons for constitutionalizing the ban. *See Ford*, 477 U.S. at 409. Only with reluctance does CJLF eventually concede that an inmate's mental state at the time of the execution has retributive importance. *See* CJLF Brief at 9 ("This is not to say that mental condition at the time of execution never undermines the retributive interest."). However, such a position, according to CJLF, "could be derived from retributive principles only in the most extreme forms of insanity, not the kind at issue in this case." *Id.* at 6. There is little dispute that Mr. Panetti suffers from either schizophrenia or schizoaffective disorder, both of which are found at the extreme end of the spectrum of mental illnesses.

> There is a perceived sense of fitness in the sight of wrongdoers being made to suffer for their misdeeds. . . . If other benefits are incidentally derived from making the wicked suffer, well and good; but those benefits must not be sought for their own sake. The purpose of punishment is to inflict deserved suffering, and the purpose of the criminal law is to provide an acceptable basis within the social framework for doing so.

Herbert L. Packer, *The Limits of the Criminal Sanction* 9-10 (1968); *see* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. Crim. L. Rev. 1313, 1317 (2000) ("Retribution . . . assumes that the criminal should be hurt, and that the injury caused by the criminal offense calls for a like infliction of injury on the criminal as a moral penalty."); Jeffrie Murphy, *Retribution Reconsidered* 15 (1992) ("Retributive theorists claim that punishment makes sure that wrongdoers suffer in proportion to their moral iniquity and thereby give up any unfair advantage over others their wrongdoing may have won them.") (footnote omitted); C. W. K. Mundle, *Punishment and Desert*, 4 Phil. Q. 216, 221 (1954) (Retribution theorists assert that "the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer"). Indeed, CJLF itself necessarily acknowledges the centrality of suffering to the retributivist's position: "The basic premise of retribution theory is that 'the return of suffering for moral evil voluntarily done, is itself just or morally good.'" CJLF Brief at 6 (quoting H.L.A. Hart, *Punishment and Responsibility* 231 (1968)).[10]

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[10] CJLF's other sources also support Mr. Panetti's view of retribution. Besides Hart, CJLF relies on the writings of Moore, who uses the familiar language of retribution that focuses on the suffering of the offender: "Retributive justice obligates those who have culpably violated their primary duties [of moral responsibility] to suffer for the violation.

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### B. Retribution demands that the offender have the mental capacity to understand that his suffering is deserved.

The offender's suffering is not alone sufficient to satisfy the retributive aim of punishment. The offender must suffer for the right reason before the community can confidently conclude that he is getting his just deserts for his wrongdoing. This is the reason the offender's mental capacity at the time of punishment is crucial to retribution: The offender must possess the cognitive ability to rationally connect his suffering with his crime. *See* Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651, 652 (1951) ("If the reason for refusing to execute an insane convict is that 'he who sins must suffer,' then ability to appreciate his impending fate is important, to make sure that he will suffer the torture of realizing what is about to happen to him.").[11] When the condemned does not understand the reason he is being made to suffer the pain of his approaching death and execution, capital punishment ceases to be an expression

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Punishing a wrongdoer by making him suffer can of course be seen as a way of 'making him pay' for his wrong." Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 416 (1997). CJLF also relies on Bradley, who reluctantly concedes that the most appropriate means to restore the societal balance disrupted by crime is through punishment that "may include sensory deprivation, even transient pain, which will likely be experienced by the criminal as 'suffering.'" Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harv. J. L. & Pub. Pol'y 19, 23 (2003).

[11] The potential lack of retributory satisfaction may explain why the State would undertake extensive efforts to save the life of a condemned inmate who attempts suicide, so that the execution can proceed as scheduled. *See, e.g.*, Holly Becka, *Suicide Try Won't Scuttle Execution: Hatchet Killer Put on Plane to Huntsville after Judge Rules*, Dallas Morning News, Dec. 9, 1999, at 37A (reporting that judge refused to delay the execution and let the inmate "cheat the hangman").

of society's moral outrage and becomes instead "mindless vengeance." *Ford*, 477 U.S. at 410.

This Court recognized in *Ford* that one of the most compelling explanations for the historical persistence of the ban on executing the incompetent is that the State's retributive purpose must be intelligible to the prisoner. *See id.* at 409 ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."). This ancient rationale may have stemmed from the notion that it was useless and, therefore, cruel to punish a person for whom suffering had no meaning. "[T]he strongest reason for a penalty is that it inflicts suffering upon the punishable person: a reason which is clearly lacking in the case of the insane person." Nigel Walker, *Crime and Insanity in England* 197 (1968) (quoting Diego de Covarrubias (1512-77)) (internal quotation marks and footnote omitted). This statement "seems to imply that the madman is incapable of suffering, perhaps because he is incapable of experiencing apprehension." *Id.*

Retribution is justified in part because it expresses society's belief in the dignity of the offender by treating him as an accountable moral agent and communicating that belief to him through the imposition of punishment. *See* Jeffrie Murphy, *Moral Death: A Kantian Essay on Philosophy* in *Retribution, Justice, and Therapy* 134-35 (1979) ("The right to be punished and regarded as a responsible agent, though sometimes painful when honored, at least leaves one's status as a moral person intact. One here gets what he has a right to in the sense that he deserves it, having brought it on himself by his choices."). Consequently, executing an inmate who does not understand the reason for his suffering subverts the death penalty's retributive force:

> By grounding retribution's worth upon the criminal's awareness of the state's desire to repudiate

> his illegitimate claims, we are also able to give greater currency to the idea that punishment is a communicative practice, not merely an expressive one. Thus, effective communication to the offender is of fundamental importance to the practice of retribution. The practice of retribution would not be intelligible, for example, if the offender could not understand the message that the state was sending.

Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157, 2195 (2001) (footnotes omitted). In short, the condemned inmate must be able to understand that he is experiencing retribution – that his execution is remuneration to society for the wrongdoing he has committed. An inmate who lacks the ability to rationally perceive this connection is not a "punishable person" for the purpose of retribution.

### C. A condemned inmate's ability to prepare for death by attempting to expiate the offense is an important aspect of retributive punishment and depends upon his capacity to rationally understand the reason he is being executed.

When the State punishes an offender, it affirms his moral accountability, because he can make the effort to atone for his wrongdoing by expressing remorse, publicly confessing his crime, apologizing to the victim's family, or seeking forgiveness. *Id.* at 2194. *Ford* recognized the enduring vitality of the common law's insistence that an inmate have the ability to prepare for death before he could be executed. 477 U.S. at 409; *id.* at 421 (Powell, J., concurring). The inmate's ability to expiate the offense serves two important functions. First, it assures the community that the inmate actually realizes that this is his last opportunity to take whatever steps he wishes to

prepare to die. It dispels society's concern that the inmate lacks "comfort of understanding," *id.* at 410, and thus prevents his execution from being "uniquely cruel." *Id.* at 421 (Powell, J., concurring). Second, the expiation stands as an outward manifestation that the retributive goal of capital punishment has been satisfied. By preparing for his death in a manner that society values, the inmate confirms society's judgment that he deserves his suffering.

This concept that "only through suffering can the criminal expiate the offense" fits the retributive theory of punishment. Packer, *supra*, at 38; *see* Charles E. Torcia, *The Purpose of Criminal Law: Retribution* § 2, in *Wharton's Criminal Law* (2006) ("The offender simply deserved to be punished; he was allowed, by suffering punishment, to expiate the sin he has committed.") (footnotes omitted); Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 387 (1962) ("The retributive theory is also stated in another way, namely that the prisoner's death is an expiation for his crime."); *State v. Angelina*, 80 S.E. 141, 141 (W.Va. 1913) (noting that defendant who was found guilty of murder in the first degree was "adjudged to be hung in expiation of the crime").

In sum, Mr. Panetti is not a "punishable person" while he remains incompetent. His awareness of the State's articulated reason for his execution does not transform his irrational understanding into rational appreciation. As his execution approaches, Mr. Panetti will either be incapable of suffering – experiencing no fear of execution because he believes he will die a martyr's death – or he will suffer in anticipation of his death, but for the wrong reason: because "the devil is trying to rub [him] out for preaching the word of Jesus Christ." JA 309. Under neither condition will his execution satisfy the retributive goal of capital punishment.

## CONCLUSION

The State's and CJLF's arguments in support of the Fifth Circuit's judgment are without merit. That judgment should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner*,

*v.*

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AND NATIONAL ALLIANCE ON MENTAL ILLNESS IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association is a voluntary, nonprofit, scientific and professional organization with more than 155,000 members and affiliates, and is the major association of psychologists in the nation.

The American Psychiatric Association, with more than 36,000 members, is the nation's leading organization of physicians who specialize in psychiatry.

The National Alliance on Mental Illness was founded in 1979 and is the nation's largest grassroots organization dedicated to improving the quality of life of persons living with serious mental illness and their families.

Members of *amici* are regularly called before courts to participate in competency hearings. *Amici* therefore have both pertinent expertise and a strong interest in the establishment of legal competency standards consistent with the best scientific knowledge about individuals suffering from mental illness. The American Psychological Association and the American Psychiatric Association have filed briefs for this Court's consideration in similar cases, including *Roper* v. *Simmons*, 543 U.S. 551 (2005); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (via briefs submitted in *McCarver* v. *North Carolina*, *cert. dismissed* 533 U.S. 975 (2001)); and *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The National Alliance on Mental Illness submitted a brief in support of petitioner's writ of certiorari in the instant case.[2]

In 2003, the American Bar Association established a Task Force on Mental Disability and the Death Penalty, which included mental health professionals who are mem-

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[1] Both parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] The National Alliance on Mental Illness submitted its brief in support of the writ of certiorari under its previous name, the National Alliance for the Mentally Ill.

bers and representatives of *amici*. The Task Force was convened in light of this Court's decision in *Atkins* to address unresolved issues concerning application of the death penalty to persons suffering from impaired mental conditions. In 2005, the Task Force presented a series of recommendations. Of pertinence here, in light of *Atkins* and this Court's subsequent decision in *Simmons*, the Task Force identified several situations in which the death penalty should not be applied to individuals with mental illness. One category encompasses individuals who, though having been determined competent to stand trial and sentenced to death, suffer from a severe mental disorder or disability that renders them incompetent to understand the nature and purpose of the death penalty. This category would include, for example, individuals whose mental illness worsens in material respects after imposition of valid sentences.[3] Based on the Task Force Report *amici* and the American Bar Association recommended, in substantially similar form, that the death penalty should not be applied to such persons.[4]

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit, in this case and in *Barnard* v. *Collins*, 13 F.3d 871 (5th Cir. 1994), has adopted a very narrow construction of this Court's decision in *Ford*, a construction that permits the execution of individuals whose severe mental illness precludes them from understanding that the State is putting them to death as retribution for their crimes. The

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[3] In addition to the recommendation discussed in text, the Task Force presented, and *amici* and the ABA adopted, recommendations relating to persons with mental retardation and equivalent impairments of intellectual and adaptive functioning, persons who were mentally ill at the time of the offense, and persons not competent to seek or assist counsel in post-conviction proceedings. *See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

[4] *Amici* gratefully acknowledge the assistance of Richard J. Bonnie, J.D., Joel A. Dvoskin, Ph.D., Kirk S. Heilbrun, Ph.D., and Diane T. Marsh, Ph.D., in the preparation of this brief.

Fifth Circuit recognized that Scott Panetti suffers from schizoaffective disorder, a severe form of psychosis, and that as a direct result he "suffer[s] from paranoid delusions that his [sentence of] execution was the result of a conspiracy against him and not his crimes." *Panetti* v. *Dretke*, 448 F.3d 815, 819 (5th Cir. 2006). The court of appeals nevertheless deemed Panetti competent to be executed under *Ford*.

*Amici* respectfully submit that the Fifth Circuit's approach is inconsistent with the reasoning of the controlling opinions in *Ford*. Scientific knowledge about schizophrenia and schizoaffective disorder supports the conclusion that persons in Panetti's condition cannot rationally understand the reasons for their execution. Convinced of the reality of their delusions, they simply cannot grasp the essential truth: that their impending execution is retribution for their crimes. Where the prisoner cannot appreciate the reason, his execution cannot further the retributive purpose of the death penalty any more than if the prisoner, as in *Ford*, suffers delusions that he can never be executed at all. As explained further in this brief, for these reasons *amici* American Psychological Association, American Psychiatric Association and the National Alliance on Mental Illness each has resolved that a prisoner is not competent to be executed if he "has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case." *See, e.g.*, American Psychological Association Council of Representatives, APA Policy Manual: N. Public Interest (2001) (incorporating policy adopted by the Council of Representatives in February 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8 (last visited Feb. 21, 2007).[5] *Amici*'s ap-

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[5] The term "appreciate" approximates the term "rationally understand." *See* Norman G. Poythress, *et al.*, *Adjudicative Competence: The MacArthur Studies* 112 (2002).; *see also Martin* v. *Dugger*, 686 F. Supp. 1523, 1569-1573 (S.D. Fla. 1988).

proach, which is consistent with *Ford*, requires reversal of the Fifth Circuit here.

In Part I of this brief, *amici* explain that individuals who, like Panetti, suffer from severe psychotic disorders such as schizophrenia or schizoaffective disorder, frequently suffer from bizarre delusions that disrupt their understanding of reality. These delusional beliefs are genuine and often unshakeable, withstanding all attempts to introduce logic or contrary evidence. When they attach to the State's reasons for carrying out the mentally ill prisoner's execution, such delusions can deny the prisoner all rational understanding about "why" he is to be executed. In such a circumstance, proceeding with the execution would not further the purposes of the death penalty. In Part II, *amici* explain that mental health experts can assist the courts in identifying prisoners with mental illness who suffer delusions that preclude them from understanding the actual reasons for their execution. Mental health professionals routinely evaluate patients for the presence of delusional beliefs and generate reliable conclusions as to how those delusions impact the patients' ability to rationally understand information.

## ARGUMENT

### I. THE FIFTH CIRCUIT'S INTERPRETATION OF *FORD* V. *WAINWRIGHT* FAILS TO PROTECT A CLASS OF SEVERELY MENTALLY ILL PRISONERS, IN CONTRAVENTION OF THE PURPOSES THAT ANIMATED *FORD*

#### A. In *Panetti* And *Barnard*, The Fifth Circuit Has Interpreted And Applied *Ford* Very Narrowly

In 1986, this Court held that the Eighth Amendment forbids the execution of individuals suffering from mental illness that renders them incompetent. *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The Court relied on common law to support its interpretation of the Eighth Amendment and identified several reasons why the execution of the insane is

unacceptable in a civilized society. *Id.* at 409-410.[6] As one justification, the Court "seriously question[ed] the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.* at 409. Yet, while suggesting that the Constitution prevents the execution of a prisoner who lacks "comprehension of why he has been singled out" for death, the Court did not provide a substantive test for defining insanity in this context. Justice Powell attempted to do so, in a separate concurring opinion largely devoted to explaining his disagreements with the procedural protections set forth by the four-justice plurality. Justice Powell noted that "today, as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." *Id.* at 421 (Powell, J., concurring). Accordingly, he concluded that "the Eighth Amendment forbids the execution . . . of those who are unaware of the punishment they are about to suffer *and why they are to suffer it.*" *Id.* at 422 (emphasis added). Justice Powell recognized that the Constitution requires, as a minimum before a prisoner may be deemed competent to be executed, that the prisoner be aware of both the fact that he will be put to death and the reason for that: society's retribution for his criminal acts.

Justice Powell's formulation has been cited approvingly by this Court, *see Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), and has been adopted unanimously by the circuits that have faced this issue, *see Walton* v. *Johnson*, 440 F.3d 160, 170-171 (4th Cir. 2006); *Scott* v. *Mitchell*, 250 F.3d 1011, 1014 (6th Cir. 2001); *Massie* v. *Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir. 2001); *Rector* v. *Clark*, 923 F.2d 570, 570 (8th Cir. 1991), including the Fifth Circuit, *Lowenfield* v. *Butler*, 843 F.2d 183, 187 (5th Cir. 1988). Yet, perhaps because nei-

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[6] Justice Powell concurred in parts one and two of Justice Marshall's opinion, 477 U.S. at 418, creating a majority for the holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409.

ther the *Ford* majority nor Justice Powell's concurrence articulated the execution competency standard with the same specificity that is characteristic of some of this Court's other competency opinions, *see, e.g.*, *Godinez* v. *Moran*, 509 U.S. 389, 396 (1993) (discussing factual and rational understanding), the Fifth Circuit on two subsequent occasions has applied the test in a way that fails to protect prisoners who possess some ability to understand the fact of their impending execution but clearly exhibit delusional thinking that impairs their comprehension of reality, including their appreciation of the reason for their death sentence.

First, in *Barnard*, the Fifth Circuit allowed the execution of an individual who, it concluded, possessed a factual understanding of the "nature, pendency, and purpose" of his execution—*i.e.*, that he was to be executed because he was convicted of murder—but whose "perception of the reason for his conviction and pending execution [was] at times irrationally distorted by a delusional system in which he attribute[d] anything negative that happen[ed] to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." *Barnard* v. *Collins*, 13 F.3d 871, 876 (5th Cir. 1994). In denying his petition for relief, the Fifth Circuit concluded that "Barnard knew that he was going to be executed and why he was going to be executed—precisely the finding required by the *Ford* standard of competency." *Id.* at 877. The Fifth Circuit ruled against Barnard despite the fact that he adhered to the delusional belief that his conviction and sentence were the result of a vast conspiracy, and in the absence of any finding that Barnard recognized any causal connection between his execution and his *crime*.

In the case at bar, the Fifth Circuit once again has ruled that the Constitution permits the execution of a severely delusional man who has no awareness of the true reason for his execution. In upholding Panetti's death sentence, the court of appeals expressly ruled that the Constitution does not bar the execution of an individual "suffer[ing] from paranoid delusions that his execution was the result of a conspiracy against him *and not his crimes*." *Panetti* v. *Dretke*,

448 F.3d 815, 819 (5th Cir. 2006) (emphasis added). Panetti understands that he has been found guilty of murder and faces execution, but holds the unequivocal and delusional belief that the State is using his crimes as a pretext, and that its real motivation is "to prevent him from preaching the Gospel." *Id.* at 816 (citing *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 709 (W.D. Tex. 2004)). Relying on *Barnard*, the court of appeals found Panetti's recognition of the State's *articulated* reason for his execution adequate to satisfy the standard set forth in Justice Powell's *Ford* concurrence, despite the court's recognition that Panetti's delusional thinking denies him awareness that the stated rationale is genuine. *Panetti*, 448 F.3d at 819 (noting that "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only that he must be 'aware' of it").

### B. Panetti Is Readily Identifiable As Suffering From Delusions That Commonly Accompany Schizophrenia And Schizoaffective Disorder

Scott Panetti is not an anomaly who by some odd quirk can correctly comprehend the fact of his execution and the State's explanation for it yet who breaks with reality when he ascribes the State's true motivation to a fantastical conspiracy or bizarre purpose. Rather, he is readily recognizable as belonging to the class of mentally ill persons who suffer from severe psychotic disorders that impede their cognitive functioning in some respects while leaving other aspects relatively unimpaired.[7] Such people may possess the ability to comprehend and understand facts about the subject of their delusions, but they are often unable to appreciate the personal significance of those facts or to reason about them in a logical way.

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[7] *Amici* of course have not examined Panetti in person; rather, *amici* rely upon the facts as set forth in the record and on Panetti's prior mental health evaluations.

### 1. Individuals who suffer from delusions firmly hold false, illogical beliefs that cannot be corrected with reason and that interfere with their ability to interpret ordinary experiences

In the scientific literature, individuals such as Panetti are commonly described as suffering from delusions: false beliefs that cannot be corrected by reasoning and that usually involve a misinterpretation of perceptions or experiences. Such delusions are often characterized by flaws in logical thinking that prevent those who suffer from them from making the right connections between ideas and from testing their beliefs about the world in ways that would enable them to determine the veracity of those beliefs.

Delusional thinking forms part of various psychotic disorders. A delusion has been defined as:

> A false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or subculture (e.g., it is not an article of religious faith). When a false belief involves a value judgment, it is regarded as a delusion only when the judgment is so extreme as to defy credibility.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 821 (4th ed. text rev. 2000) (hereinafter DSM-IV-TR).

Delusional thinking is a hallmark symptom of schizophrenia[8] and of related psychotic disorders, such as schizoaf-

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[8] Schizophrenia is typically defined as encompassing two or more of the following five symptoms: (1) delusions, (2) hallucinations, (3) disorganized speech; (4) grossly disorganized or catatonic behavior; and (5) negative symptoms, *i.e.*, affective flattening (diminished emotional expressiveness), alogia (poverty of speech), or avolition (inability to initiate and persist in goal-oriented activities). DSM-IV-TR 299-301, 312.

fective disorder.[9] It may also occur as a symptom of mood disorders such as depressive disorders or bipolar disorders.[10] It is particularly pronounced in what is known as the Paranoid Type of Schizophrenia. DSM-IV-TR 313-314. The essential feature of this type of schizophrenia is "the presence of prominent delusions or auditory hallucinations in the content of a relative preservation of cognitive functioning and affect." *Id.* at 313. Typically, persons with this condition suffer from delusions that are categorized as *persecutory* and/or *grandiose*. *Id.* A persecutory delusion, generally speaking, is a delusion whose theme involves a conspiracy or other form of malicious obstruction to thwart the individual's goals. *Id.* at 325. A grandiose delusion is one whose central theme involves the patient possessing a great yet unrecognized talent, sometimes accompanied by the belief that the patient has a special relationship with a prominent person or bears a special message from a deity. *Id.* The two types of delusions are often intertwined: persons experiencing persecutory delusions may reason that, as one textbook puts it, "they must be very important if so much effort is spent on their persecution." Robert Cancro & Heinz E. Lehmann, *Schizophrenia: Clinical Features*, in 1 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 1187 (7th ed. 2000).[11]

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[9] Schizoaffective disorder essentially consists of schizophrenic symptoms coupled with, at some point, either a major depressive episode, a manic episode, or a mixed episode (*i.e.*, an episode in which the individual alternates between major depressive and manic symptoms). DSM-IV-TR 319-323.

[10] *See generally* DSM-IV-TR 345-428; *see also id.* at 327 (discussing Mood Disorders With Psychotic Features).

[11] It is important to distinguish delusional beliefs from beliefs that are merely wrong. An individual who believes that her husband is cheating on her may be mistaken, but her view may not be delusional, depending upon the facts that she adduces to support her belief. But, the individual who, in one reported case, based such a belief solely on the presence of a red car outside of her apartment, is clearly delusional. *See* Adolfo Pazzagli, *Delusion, Narrative, and Affects*, 34 J. of the Am. Acad. of Psychoanalysis & Dynamic Psychiatry 367, 370 (2006).

Psychotic disorders such as schizophrenia distort the mind in certain ways while leaving other functions generally intact. As noted above, an individual with paranoid schizophrenia may possess "a relative preservation of cognitive functioning." DSM-IV-TR 313. Yet such a person, plagued by a delusional psychotic disorder, may have no ability to apply his cognitive functions to test the veracity of the conclusions that he draws; while the *process* of a person's thinking appears normal, the *content* of the thoughts defies accepted reality. For example, a person who is under the delusion that he is the basketball player Michael Jordan may be unable to "test reality" in a way that would disprove his belief. Michael Jordan is tall, athletically gifted, widely recognized, and wealthy. Even after it is pointed out to the delusional person that he possesses none of these characteristics—and even if the person *agrees* that he does not—he may persist in his belief that he is in fact Michael Jordan.

Scientific literature is replete with examples of persons whose reasoning is faulty in this way. In his landmark study *The Three Christs of Ypsilanti*, psychologist Milton Rokeach chronicled the experiences of three patients with schizophrenia in the Ypsilanti State Hospital in Michigan, who each believed that he was Jesus Christ. *See* Milton Rokeach, *The Three Christs of Ypsilanti* 50-74 (1964). Despite their inability to perform the miracles that they claimed to be able to perform, despite their inability to evidence any other Christ-like behavior, and despite their interaction with the others claiming to be Christ, the three individuals persisted in the delusion that they were Jesus Christ.[12] They were only superficially aware that they were in a mental hospital; one believed he owned the surrounding land, another had a variety of explanations for his presence, and the third said he had been sent to straighten out the other two. Shortly

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[12] The third individual at one point switched to a different, equally delusional identity, "Dr. Righteous-Idealed 'R.I.' Dung, Mentalis Doktor," yet at the same time continued to believe he was Jesus Christ. Rokeach, 139-142.

after meeting the first time, the three quickly developed rationalizations for why there were others claiming to be Christ. One, in fact, confirmed his belief that he was the true Christ by pointing out that the other two could not possibly be the true Christ because they resided in a mental hospital.

Such persons may understand much of the world around them and have real intelligence. Yet their delusional thought process may consistently lead them to wildly incorrect results. As one psychiatry textbook explains:

> Disturbances of thinking and conceptualization are one of the most characteristic features of schizophrenia. The feature common to all manifestations of schizophreni[c] thought disorder is that patients think and reason . . . according to their own intricate private rules of logic. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But their thought processes are strange and do not lead to conclusions based on reality or universal logic.

Cancro & Lehmann, *supra*, at 1189. A classic example of this is the case of a woman who believed she was the Virgin Mary. This woman reasoned the following: "The Virgin Mary was a virgin. I'm a virgin. Therefore, I am the Virgin Mary." Silvano Arieti, *Interpretation of Schizophrenia* 195 (1955). By taking two facts and applying a process that appeared to her to be logical, she arrived at a conclusion that—to everyone but her—was not. The internal logic of such delusions is akin to the logic that nondelusional persons experience while dreaming—indeed, individuals with schizophrenia have been described as "dreaming with their eyes open." Cancro & Lehmann, *supra*, at 1190. Thus, a person suffering from schizophrenia or schizoaffective disorder may know that he has committed a crime; that the death penalty is imposed on persons who commit such crimes; and that the State has asserted he will be put to death because he committed that crime; and yet be absolutely and unwaveringly

certain that his execution is not in fact a response to his crime but is instead an effort to prevent him from preaching the Gospel.

### 2. Panetti suffers from grandiose, persecutory delusions that disrupt his understanding of the purpose of his execution

Based upon the record and findings in this case, Panetti clearly falls into this framework. He is not incoherent: the district court found that "at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion." *Panetti*, 401 F. Supp. 2d at 708. As one of the State's experts concluded, Panetti possessed a "capacity to understand the Bible, to understand history, movies." *Id.* Indeed, he represented himself at trial, cross-examined witnesses, and applied for subpoenas.

Yet, in the decade preceding his crime, Panetti was hospitalized with diagnoses that included schizophrenia, schizoaffective disorder, and bipolar disorder—all serious mental disorders that, in his case, were accompanied by psychotic symptoms such as auditory hallucinations and delusions of persecution and grandiosity. Pet. 3. While defending himself at trial, he exhibited a wide array of delusional behaviors. His cross-examination tended to be rambling and illogical, and he attempted to subpoena John F. Kennedy, Pope John Paul II, and Jesus Christ. Although Panetti knows that the State claims it intends to execute him for the murders that he committed, he believes—in the words of one of the experts who examined him—that "God had nullified it, God had forgiven him, God had wiped the slate clean." *Panetti*, 401 F. Supp. 2d at 707. And the district court credited testimony from one of the State's experts who concluded that:

> Panetti does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him. [That expert's] testimony is consistent with that of

> Dr. Conroy, Dr. Rosin, and Dr. Silverman, each of whom testified Panetti believes the real reason he is to be executed is for preaching the Gospel.

*Id.* at 712; *see also id.* at 707 (Panetti suffers from "grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs"). As reflected in the findings and the testimony below, therefore, Panetti is able to draw some logical connections but suffers from textbook persecutory and grandiose delusions centered around religion that render him deeply disturbed and deny him any genuine understanding of the reason for his execution.

Although the record does not reflect the methods employed by the doctors who examined Panetti, it is likely that his delusional belief withstood all attempts to "test reality" by confronting him with contrary evidence. A person who is captive to such a delusion would likely be unconvinced by evidence that, for example (1) the State does not, in fact, seek to execute people for preaching the Gospel, and (2) the State has certainly not sought to execute others whose preaching is heard by many more than Panetti's.[13]

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[13] The record in *Barnard* is much more sparse than in *Panetti*; accordingly, it is difficult to assess the true nature of Barnard's delusions. Because the state court found that Barnard tended to blame his conviction on "a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia," 13 F.3d at 876, it is likely that his beliefs would have withstood efforts to test reality by presenting him with evidence that (1) those five groups do not, in fact, work in concert, (2) there is no reason why those groups would have any motive to do him harm, and, (3) most fundamentally, those groups do not control the judicial system, and thus did not bring about his conviction.

### C. Contrary To The Rationale Of *Ford*, By Permitting The Execution Of Prisoners Who Suffer From Psychotic Delusions, The Fifth Circuit's Approach Permits Executions That Do Not Further The Death Penalty's Retributive Purpose

Insisting that the death penalty must serve its core retributive purpose in every case, Justice Powell wrote in *Ford* that "the Eighth Amendment forbids the execution . . . of those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422. In *Panetti*, the Fifth Circuit held that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding.'" *Panetti*, 448 F.3d at 821. Accordingly, the court of appeals allowed the execution of an individual who believes that the State's expressed reason for his execution is merely a pretext for the true reason: to stop him from preaching Gospel. The Fifth Circuit's approach fails to recognize the force of the delusions that characterize psychotic disorders such as Panetti's, and thus, contrary to *Ford*, permits executions where the retributive purpose of the death penalty is not served.

As a simple linguistic matter, "awareness of why" a person is to suffer the death penalty might arguably be construed to include mere "awareness of *what the State has claimed as a reason*." But that circumscription of Justice Powell's test otherwise makes little sense. There are individuals, like Panetti, who know what the State says but believe just as surely that the State's claim is not true. The Fifth Circuit's approach permits the execution of such severely delusional individuals even though they believe they are to be executed for *something other than their crimes*, notwithstanding the State's assertions to the contrary.

The Fifth Circuit's standard makes some forms of severe delusion about one's impending execution matter, while others do not. For example, an individual capable of repeating back the State's stated reasons for the execution may not be executed if he believes that his execution is impossible (as in *Ford*), but may be executed if he considers it possible or

certain but entirely misapprehends why the death penalty is actually being applied to him. Yet both individuals suffer from debilitating delusional thinking about their forthcoming execution and therefore the retributive purpose of the death penalty is not served in either circumstance. Indeed, Justice Powell plainly recognized that the prisoner's awareness of the "why" was as important to the legitimacy of the execution as his awareness of the "whether." Nor does it appear that the retributive purpose is served more fully when the State executes a person whose delusions cause him entirely to disbelieve the State's asserted rationale than when it executes one who cannot comprehend that rationale in the first place.

Indeed, of the various grounds articulated by the *Ford* majority, none supports privileging one sort of fundamental delusion about an impending execution over another. Whether the ground is that "the execution of an insane person simply offends humanity," 477 U.S. at 407, or that such an execution "provides no example to others," *id.*, or that "it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it," *id.*, or that "madness is its own punishment," *id.*, or that executing an insane person serves no retributive purpose, *id.*; *see also id.* at 422 (Powell, J., concurring), there is no reason to spare one individual beset by a delusion regarding whether death awaits or the State's purported reasons for imposing the penalty, yet to execute another individual plagued by a different yet equally irrational delusion regarding the same subject.

### D. All Three *Amici* Have Adopted A Common Position On This Issue

For these reasons, with respect to competency to be executed, *amici* and the American Bar Association have respectively adopted substantively identical versions of a recommendation proposed by the Task Force on Mental Disability and the Death Penalty:

> If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.[14]

This recommendation, *amici* submit, draws the proper line between individuals who are competent to be executed and those who are not. The recommendation recognizes that it is impossible to draw a meaningful line among the myriad delusions that may fog an individual's understanding of his pending execution, or the reasons for it.

Specifically, under the recommendation, awareness of the "why" of an execution necessarily includes understanding the reason the death penalty is being applied in one's own case. The Report of the Task Force, which explains the reasoning that underlies each recommendation, stated that an offender who has been sentenced to die

> must "appreciate" its personal application in the offender's own case—that is, why it is being imposed

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[14] American Psychological Association Council of Representatives, APA Policy Manual: N. Public Interest (2001) (incorporating policy adopted by the Council of Representatives in February 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8 (last visited Feb. 21, 2007); *Mentally Ill Prisoners on Death Row: Position Statement*, American Psychiatric Association (2005), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf (last visited Feb. 21, 2007). The National Alliance on Mental Illness adopted an earlier version of this language. *Public Policy Platform of the National Alliance on Mental Illness* 50 (8th ed. 2006), *available at* http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Public_Policy/NAMI_Policy_Platform/NAMI_public_policy_platform_Nov2006.pdf (last visited Feb. 21, 2007). The ABA adopted a later version of this proposal with a different final clause. *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

> *on the offender*. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

*Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 675 (2006). In short, it does not fulfill the retributive purpose of the death penalty to execute an individual, like Panetti, who has no rational understanding as to why the punishment is being imposed on him. For that reason, the Fifth Circuit's ruling should be reversed.[15]

## II. Mental Health Professionals Can Reliably Identify The Nature And Extent Of An Individual's Rational Understanding Of An Impending Execution And Routinely Make Similar Assessments In Other Judicial Contexts

The evaluation of an individual's capacity to appreciate—or rationally understand—information is a fundamental and uncontroversial aspect of forensic mental health assessment that can be, and regularly is, performed by mental health professionals. The central feature of such an assessment is the clinical interview.

In the context of competency to be executed, the interview would begin with general, factual questions such as:

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[15] *Amici* and the ABA also resolved that an individual who is found incompetent to face the death penalty should have his sentence permanently commuted to a non-capital punishment. If the death penalty is not commuted but instead is merely suspended in the event the individual's condition were to improve, then the process would force an individual with mental illness to choose between living with psychotic suffering and accepting treatment that might result in his execution. This issue is not implicated here.

"Why are you in prison?" and "Why have you been sentenced to death?" After establishing the factual framework, the interview could be expected to address the examinee's rational understanding with questions like: "Will you be executed?" and "What preparations have you made in anticipation of your execution?" *See, e.g.*, Patricia A. Zapf, *et al.*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. & L. 103, 117-119 (2002). To the expert forensic psychologist or psychiatrist, the answers to these questions reveal the subject's mental capacities, and clarifying follow-up questions can probe ambiguous replies. In addition, the clinician will consult collateral sources of information, including prison personnel, family members, and attorneys, as well as the individual's treatment records and mental health history. Kirk Heilbrun, *Principles of Forensic Mental Health Assessment* 99-107 (2001); *see also* Mark A. Small & Randy K. Otto, *Evaluations of Competency to be Executed: Legal Contours and Implications for Assessment*, 18 Crim. Just. & Behav. 146, 154-155 (1991).

In the case at bar, the experts for the State and for the defense largely concurred in the most important aspects of their assessments. *Panetti* v. *Dretke*, 401 F. Supp. 2d 702, 707-708, 712 (W.D. Tex. 2004) (all experts testified that Panetti possesses cognitive functionality with respect to certain topics and communications, yet suffers delusions, including the belief that he will be executed for preaching the Gospel). Disagreements were limited to the degree, and not existence, of Panetti's delusions pertaining to the reason for his impending execution, *Panetti* v. *Dretke*, 448 F.3d 815, 817 (5th Cir. 2006), and thus the parties' dispute has focused on the impact of Panetti's functional deficiencies on the ultimate question of "competence to be executed," which is a legal, not a scientific or medical, question.

Expert agreement in this area can be attributed to two factors: first, the underlying scientific and clinical concepts—the nature of psychotic delusions and the concept of "rational understanding"—are well established; second,

when the diagnosis is made through an evaluation of the prisoner's currently presenting condition, no extrapolation is needed to assess the prisoner's condition at a remote time in the past.[16] Indeed, the expert consensus on Panetti's diagnosis is consistent with studies showing that mental health professionals using structured interviews and assessing present-oriented functional capacities typically have very high levels of agreement. *See, e.g.*, Gary B. Melton, *et al.*, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 138 (2d ed. 1997). Thus, mental health experts can provide testimony that can meaningfully inform judicial decisions about competency to be executed with established procedures that have a record of producing reliable, consistent results.

## CONCLUSION

*Amici* submit that the Fifth Circuit's competence for execution standard permits the execution of individuals who lack any meaningful understanding of the nature and purpose of their punishment, contrary to this Court's decision in *Ford*. *Amici* urge this Court to reverse the judgment of the Fifth Circuit.

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[16] These characteristics should go far to dispel any concerns this Court may have about the role of mental-disease evidence in this context. *Cf. Clark* v. *Arizona*, 126 S. Ct. 2709, 2734-2736 (2006).

Respectfully submitted,

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# In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner*,

versus

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF NATIONAL ALLIANCE FOR THE MENTALLY ILL (NAMI)

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## INTEREST OF AMICUS CURIAE[1]

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of persons living with serious mental illness and their families. Founded in 1979, NAMI has become the nation's voice on mental illness, a national organization including NAMI organizations in every state and in over 1,100 local communities across the country, who join together to meet the NAMI mission through advocacy, research, support, and education. NAMI is dedicated to the eradication of mental illnesses and to the improvement of the quality of life of all whose lives are affected by these diseases. NAMI joins this brief in its belief that education and understanding about mental illness at all levels of judicial and legal systems is crucial to the appropriate disposition of cases involving offenders suffering from mental illness.

## REASONS THE WRIT SHOULD BE GRANTED

### I. INTRODUCTION

Twenty years ago, this Court heard the case of Alvin Ford, a schizophrenic death row inmate. Ford was delusional; he firmly and falsely believed that he could not be executed. Ford's attorneys argued that the Eighth Amendment prohibits the execution of persons who are incompetent or insane. This Court agreed. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Justice Powell's

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

concurring opinion, which sought to "determine the precise definition" of "the category of defendants defined by their mental state" for whom the Eighth Amendment bars execution, *id.* at 419, provided what most lower courts now recognize as the standard for determining whether a State may execute a mentally ill or cognitively impaired prisoner. *See Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). According to Justice Powell:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly . . . the Eighth Amendment forbids the execution only of those who are unaware of [1] the punishment they are about to suffer and [2] why they are to suffer it.

*Ford*, 477 U.S. at 422 (Powell, J., concurring) (emphasis added).[2]

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[2] In Ford's support, organizations of mental health professionals, including the American Psychiatric Association and the American Psychological Association entered as *amici curiae*, to ensure that "the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination." Brief of Amicus Curiae for the American Psychiatric Association, *Ford v. Wainwright*, No. 85-5542 (1985); *see* Brief of Amici Curiae for the American Psychological Association and Florida Psychological Association, *Ford v. Wainwright*, No. 85-5542 (1985). The *amici* did not express opinion on the existence of an Eighth Amendment right or on the appropriate language for a governing legal standard; "resolution on those matters," one *amicus* wrote, "turns on considerations as to which [it] possesses no special expertise." *Id.* at 6. *Amici* simply urged that if there was a right protecting the insane from execution, the Court must not "denigrate" that right by skirting reliability of the evaluations upon which competency-to-be-executed determinations would rely. *See id.* at 7.

The Eighth Amendment categorical bar against executing incompetent persons – if it is to be applied fairly and reliably – is compromised by the Fifth Circuit's interpretation and application of the competency to be executed standard. In the past year, the American Psychiatric Association, the American Psychological Association, and the American Bar Association all have adopted resolutions or position statements addressing the execution of prisoners who suffer from severe mental illness. The American Psychiatric Association has publicly expressed concern over the Fifth Circuit's interpretation of the *Ford* standard, seeing in it "confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution." American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005); *see* American Bar Association, Resolution 122A (Aug. 8, 2006). *Amici* share this concern. The important issue presented by this case is whether the competency to be executed standard currently used by the Fifth Circuit is under-inclusive in a constitutionally offensive manner. *Amici* submit that it is.

*Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006) is a striking case, not only because of the severity of petitioner's mental illness, his farcical self-representation in the fiasco that served as his trial, and the widespread media coverage the case has received (*see, e.g.*, Blumenthal & Liptak, *Judging Whether a Killer Is Sane Enough to Die*, N.Y. Times (June 2, 2006)), but because unlike many cases involving testimony of psychiatric diagnosis and opinion, the experts agree that Panetti is severely mentally ill. In fact, they agree that Panetti suffers from schizophrenia, the most debilitating mental illness. The focus of this case, therefore, lies not in a battle of the experts as to whether Scott Panetti is severely mentally

ill, he clearly is and there is no dispute about it. The issue is whether his schizophrenia renders him incompetent to be executed; therefore, the focus of this brief is on the Fifth Circuit's interpretation and implementation of the constitutional mandate of *Ford*. *See Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006).

*Amici* have two central concerns. The first is the failure of the Fifth Circuit's competency to be executed standard to comport with the retributive rationale for the right espoused in *Ford*. *See* Petitioner's Brief at 24-32. The second concern, which is more significant to mental health professionals and organizations, is the fact that the Fifth Circuit's standard draws medically arbitrary distinctions between severely mentally ill persons. For both reasons, the Fifth Circuit's errant application of *Ford* wrongly and arbitrarily renders severely mentally ill prisoners subject to execution. More specifically, *Amici* are concerned here with death sentenced prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the fact that they will be executed and/or the actual reason for their execution. The Fifth Circuit's interpretation of *Ford* wrongly excludes this set of prisoners from the Eighth Amendment category established in *Ford*.

*Amici* begin by explaining the delusional belief systems characteristic of schizophrenia. We then discuss how the Fifth Circuit's interpretation of *Ford* fails to take these significant impairments into account, specifically with regard to Mr. Panetti. Finally, we discuss a proper interpretation of *Ford*, one that was recently articulated and embraced by the American Psychiatric Association.

## II. SCHIZOPHRENIA & DELUSIONAL BELIEF SYSTEMS

Within the set of prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the finality of their execution and the actual reason for the execution, the most prevalent affliction, and that which affects Mr. Panetti, is schizophrenia. The clinical diagnosis of schizophrenia involves a finding of one of the following symptoms: (a) thought echo, thought insertion or withdrawal, or thought broadcasting; (b) delusions of control or influence or delusional perceptions; (c) hallucinatory voices; and (d) persistent delusions of other kinds that are culturally inappropriate and completely impossible. World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (Geneva, 1993). The diagnostic criteria for schizophrenia under the DSM-IV likewise involve a finding of one or two (depending upon severity) of the following symptoms: (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly organized or catatonic behavior; (5) negative symptoms such as affective flattening. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Wash. DC, 1994). As the criteria show, perceptual and thought disorders are the core elements of the clinical definition of schizophrenia:

> The feature common to all manifestations of schizophrenia thought disorder is that patients think and reason on their autistic terms according to *their own* intricate private rules of *logic*. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But

> their thought processes are strange and do *not* lead to conclusions based on *reality*. . . .

Cancro & Lehmann, *Schizophrenia: Clinical Features*, in Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 7th ed., vol. 1 (2000), at 1189 (emphasis added).

The thought disorders – delusions – that underlie schizophrenia are often persistent. And often, from the perspective of everyone other than the patient, they do not equate with logic. *See* WHO, *ICD-10*. By definition, delusions are "false ideas that cannot be corrected by reasoning and that are idiosyncratic for the patient (i.e., not part of the patient's cultural environment). *Id.* at 1187; *see also Mental Health: A Report of the Surgeon General* (2002) ("Delusions are firmly held erroneous beliefs due to distortions or exaggerations of reasoning and/or misinterpretations of perceptions or experiences.") (internal quotation and citation omitted). Most commonly, the delusions experienced by a person suffering from schizophrenia involve a scenario of persecution accompanied by grandeur, battles between good and evil involving high stakes. Cancro & Lehmann at 1187-88. As the National Institute of Health explains:

> Delusions are false personal beliefs that are not part of the person's culture and do not change, even when other people present proof that the beliefs are not true or logical. People with schizophrenia can have delusions that are quite bizarre, such as believing that neighbors can control their behavior with magnetic waves, people on television are directing special messages to them, or radio stations are broadcasting their thoughts aloud to others. They may also have delusions of grandeur and think they are famous

> historical figures. People with paranoid schizophrenia can believe that others are deliberately cheating, harassing, poisoning, spying upon, or plotting against them or the people they care about. These beliefs are called delusions of persecution.

NIMH, *Schizophrenia*, NIH Publication No. 3517 (2004).

In sum, two defining features characterize the delusions that make up schizophrenia: first, the delusions are not based on the patient's cultural environment – in broad terms, they are not based on reality; second, the delusions are firmly held beliefs that are not subject to change, even in the presence of true, logical proof. Neither feature, however, factors into the Fifth Circuit's interpretation of *Ford*.

## III. THE FIFTH CIRCUIT'S MISGUIDED INTERPRETATION OF *FORD*

The Fifth Circuit maintains that it uses Justice Powell's competency to be executed standard in evaluating *Ford* claims. *Panetti*, 448 F.3d at 819 (citing *Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988)). But the Court of Appeals' interpretation of what it means for a prisoner to be "unaware of the punishment they are about to suffer and why they are to suffer it," *Ford*, 477 U.S. at 422 (Powell, J., concurring), only partially encompasses the mentally ill individuals Justice Powell had in mind. The Fifth Circuit's understanding of the competency to be executed standard is essentially this: A severely mentally ill prisoner is competent to be executed if he is merely aware of the reason the State has given for executing him. According to the Court of Appeals, a prisoner need not "rationally understand" or comprehend the reason for his

execution, he need only be "aware" of it. *Panetti*, 448 F.3d at 819 (citing *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994)).

In *Barnard*, the Fifth Circuit found a prisoner competent who knew he was to be executed on a certain day, and who knew he was to be executed for killing a boy during a robbery. The court deemed it of no consequence that the prisoner simultaneously believed his pending execution was the final chapter of a delusional conspiracy against him rather than punishment for felony murder. 13 F.3d at 876. In this case, the court concluded that Panetti's competency claim was governed by *Barnard*. And the court ruled Panetti competent because Panetti can parrot that the State told him he would be executed for killing his wife's parents. That, according to the court below, satisfied the "nature, pendency, and purpose" test the court applied in *Barnard*. *Panetti*, 448 F.3d at 819.

### A. The Factual Discrepancy Between *Barnard* And *Ford*

*Barnard*, however, is fundamentally at odds with *Ford*. The starkest evidence that the line the Fifth Circuit has drawn is not one this Court intended is that, by the Fifth Circuit's approach, the symptoms alleged by Alvin Ford, whose claims gave rise to the governing standard, would not make the constitutional cut. In response to assertions that he would be executed, Alvin Ford acknowledged, "I know there is some sort of death penalty." *Ford*, 477 U.S. at 403. But Ford also believed that he had eliminated executions and therefore could not suffer the death penalty. *Id.* In essence, Ford's response when told of his impending execution was, "I know you say there is a death

penalty by which you will execute me, but I do not believe it." Ford's belief that he had eliminated executions, coupled with his perception that he "owned the prisons and could control the Governor through mind waves," *id.*, was firmly at odds with reality.

Contrary to *Barnard*, a plurality of this Court viewed the dichotomy between reality and Ford's delusional belief as evidence of incompetence, justifying a remand to state court for a competency hearing. *Id.* at 410 ("Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution."). And Justice Powell, reviewing the facts under his newly announced standard for competence to be executed, asserted that if the facts Ford presented were accurate, "petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated." *Id.* at 422 (Powell, J., concurring).[3] For both the majority and concurring opinions in *Ford*, execution could only be justified if it had retributive value. And that value, in the Court's view, was lost on prisoners like Ford, who did not believe and therefore had not internalized the finality of execution.

The facts of *Ford* display the flaws in the Fifth Circuit's interpretation of Justice Powell's standard. That court fails to take into account precisely the thought impairments and the resulting impossible beliefs that the

[3] Unlike *Ford*, Panetti's delusional belief system affects his ability to appreciate the reason "why" he will be executed, rather than, as in Ford's case, the fact of execution itself.

*Ford* Court found indicative of incompetence. The Fifth Circuit ignores the medical condition, deemed relevant in *Ford*, in which dichotomous belief systems impair mentally ill prisoners from internalizing "why" they will be executed.[4]

### B. Panetti Deserves Protection Under *Ford*, But Is Denied It Under *Barnard*

Mr. Panetti's schizophrenic symptoms place him well within the category of severely mentally ill persons whose executions are prohibited by the Eighth Amendment. Since 1986 (six years prior to the crime), Panetti has been diagnosed repeatedly as suffering from schizophrenia or schizoaffective disorder.[5] No diagnosis has contradicted

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[4] The Fifth Circuit's decision in *Lowenfield*, cited by the Fifth Circuit as the case in which it adopted Justice Powell's standard, treads much more closely to *Ford* than *Barnard*. In *Lowenfield*, the Fifth Circuit held that a diagnosis by a single psychologist that the defendant was a paranoid schizophrenic did not present a threshold showing of incompetence to be executed under *Ford*. 843 F.3d at 187. *Lowenfield* characterized the *Ford* standard as whether the prisoner "'comprehends the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford*, 477 U.S. at 417).

[5] *See* Scott Panetti's medical records, admitted as State Exhibits 1 through 6 at the second competency-to-stand-trial proceeding in 1994: Panetti was diagnosed at Starlite Village Hospital with chronic undifferentiated schizophrenia in April 1986; diagnosed at Kerrville State Hospital with schizophrenia in mid-May 1986; diagnosed at Waco Veteran's Hospital with chronic undifferentiated schizophrenia in late May 1986; diagnosed at Tomah Veteran's Hospital with schizophrenia in July 1986; diagnosed at Starlite Village Hospital with schizophrenia in October 1986; diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in November 1986; and diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in 1992, just months before crime. Panetti

(Continued on following page)

that Panetti suffers from a schizophrenic condition.[6] Both doctors who examined Panetti to determine his competence to stand trial recognized schizophrenia and schizophrenic symptoms. *See* Petitioner's Brief at 4-7. Both agreed that Panetti's delusions and other symptoms would worsen if Panetti stopped taking antipsychotic medication, which he did shortly before representing himself at trial

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was also diagnosed at Cumberland Memorial Hospital with depression, brain dysfunction, auditory hallucinations, homicidal ideations, and delusions in August 1986; diagnosed at Northern Pines Unified Services Center as suffering from depression and suicidal ideation in September 1986; committed to Kerrville State Hospital in 1990 for homicidal behavior after threatening to kill himself, his wife, baby, and father-in-law, believing the citizens of Kerrville were plotting against him. These diagnoses are not inconsistent with the diagnoses of schizophrenia. Further, during the competency-to-be-executed proceedings, Dr. Conroy, a forensic psychologist, diagnosed Panetti as suffering from schizoaffective disorder, a form of schizophrenia. *See* transcript of federal district court competency-to-be-executed hearing, vol.1, at 14, 21-22 (*Amici* adopt Petitioner's citation form and will refer to the hearing transcript as "FH"). Dr. Cunningham, a clinical and forensic psychologist, testified that Panetti suffers from a disorder on the schizophrenic and/or schizoaffective spectrum, that he is actively psychotic. *See Panetti v. Dretke*, 401 F.Supp.2d 702, 707 (W.D. Texas 2004) (finding Panetti suffers from "some form of mental illness", which doctors had characterized as schizoaffective disorder).

[6] Of the experts appointed during the competency-to-be-executed proceedings, Dr. Anderson, a court-appointed forensic psychiatrist, refused to diagnose schizophrenia because she did not believe the diagnosis relevant to the *Ford* standard (Dr. Anderson also did not reach a conclusion as to whether Panetti was competent to be executed.). 2 FH 40-41. Dr. Parker, a court-appointed clinical psychologist, found that Panetti has "serious psychological problems." 1 FH at 134. Dr. Rosin, a psychologist, recognized that Panetti suffered from a fixed delusional system. 1 FH at 82, 89-90. And Dr. Silverman, a psychiatrist, testified that the dosages of medication that Panetti was taking before trial were "diagnostic of psychotic illness." 1 FH at 122.

and which he never resumed.[7] *See* Petitioner's Brief at 8-10. And each of the mental health experts who testified during the District Court competency hearings agreed (whether they reported a diagnosis of schizophrenia or not) that Panetti suffers from a fixed delusional belief system: While Panetti is aware of the State's stated reason for executing him, he believes that the State, in conjunction with forces of darkness, wants to kill him for preaching the Gospel. *See Panetti*, 401 F.Supp.2d at 708-09; *id.* at 708, n.3. Panetti's mind holds a composite belief that is completely impossible.

Under *Barnard*, this dichotomy – and more important, this tension – between reality and Panetti's delusion is irrelevant. But under *Ford*, the fact that Panetti believes the State's explanation for his execution is a "sham," (1 FH

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[7] That Panetti was permitted to represent himself after going off the antipsychotic medication he was taking when found competent to stand trial is also profoundly troubling to *Amici*. *See* Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 Cath. U. L. Rev. 1153, 1163-65 (2005); *see also* Jodi L. Vilojen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26:5 Law & Hum. Behav. 481, 497 (2002) ("In comparison to defendants with other types of psychotic disorders . . . defendants with schizophrenia demonstrated considerable more impairment on legal abilities. This finding is consistent with the high rates of cognitive and functional impairments in individuals with schizophrenia."). Two doctors who had previously treated Panetti, and who had previously diagnosed him as suffering from schizophrenia, watched the trial. Dr. F. E. Seale who treated Panetti at Starlite Village Hospital in 1986 stated that during the trial Panetti was suffering from "delusion," "totally out of touch with reality," and "obviously mentally ill." Affidavit of F. E. Seale, Ph.D. Dr. Wolfgang Selck, who treated Panetti at Starlite Village Hospital in April 1986, stated that Panetti's inappropriate and grandiose self-representation at trial was the product of delusion and constituted a "break from reality." Affidavit of Wolfgang Selck, Ph.D.

at 25; *see* Petitioner's Brief at 20), a pretextual explanation by authorities to cover up the forces of darkness' plot to stop his preaching of the Gospel, eviscerates the retributive benefit of executing the man. It is evident that Panetti, though aware of his legal proceedings, has not internalized "the nature of the debt that [he] owe[s] society." Christopher Slobogin, *Minding Justice: Laws That Deprive People With Mental Disability of Life and Liberty*, at 94 (Harvard University Press, 2006). In accord with the retributive rationale for the Eighth Amendment right adopted by the *Ford* majority and concurring opinions, Panetti's express disbelief of the State's reason is clear evidence that he is incompetent.

## IV. THE PROPER INTERPRETATION OF THE *FORD* STANDARD: MERE "AWARENESS" IS NOT A MEANINGFUL REQUIREMENT FOR A STANDARD PREVENTING EXECUTION OF THE INSANE

This case exemplifies why mere "awareness," the test applied by the Fifth Circuit, is not a meaningful requirement for determining whether to execute prisoners who are severely mentally ill. The mere awareness test makes no sense when applied to a prisoner who is plagued by delusions of grand persecution, as severely mentally ill, schizophrenic individuals like Mr. Ford and Mr. Panetti very often are. From the perspective of the mental health profession, and with regard to diagnoses of schizophrenia and related mental illnesses in particular, the distinction that the Fifth Circuit draws between "rational understanding" and "awareness," *see Panetti*, 448 F.3d at 819-21

(citing *Barnard*), is false. A severely mentally ill patient who lacks "actual awareness," lacks awareness, period.[8] Hence the concern of the American Psychiatric Association over the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

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[8] This is not a matter of epistemology about what it means to "know" – certainly there are different types of knowledge, in linguistic terms and in legal standards, and it is the law's provenance to determine the meaning of "knowledge" or "awareness" in any given context. Nor does the issue here involve a metaphysical debate over the nature of life and death. *Cf. Walton v. Johnson*, 440 F.3d 160, 179 (4th Cir. 2006) (Wilkinson, J. concurring) ("Judges called upon to interpret the Eighth Amendment may not engage in metaphysical inquiries under the guise of constitutional interpretation. . . . The Powell test appreciates that the Constitution does not countenance judicial forays into inherently philosophical arenas."). *Amici*'s contention is simply that the *Barnard* test excludes persons who are in fact incompetent to be executed.

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also *must "appreciate" its personal application in the offender's own case* – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (emphasis added) (citations omitted); *accord Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1115 (2005), § 3(a); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1173 (2005).

As the APA emphasizes, mere "awareness" of "the nature and purpose of punishment" has little meaning in the context of an individual suffering from delusional belief systems. *Amici* agree with the APA that a meaningful (and faithful) interpretation of the *Ford* standard requires more; a mentally ill individual must "appreciate" the "personal application" of the punishment "in the offender's own case." To be competent, a prisoner must have the capacity to reflect on the execution as punishment for the crime

committed and *internalize the execution as payback to society*. This requires that a condemned inmate have enough grasp of reality to believe that he really will die, and enough to believe that the real reason he will die is because of his crime.[9]

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[9] It is important to emphasize that *Amici*'s position is not that *all* prisoners diagnosed with schizophrenia are categorically incompetent for execution. Nor is *Amici*'s position that *Ford* exempts from execution *only* those who have been diagnosed with schizophrenia or a particular mental illness. *See* Honberg, 54 Cath. U. L. Rev. at 1166 ("If we define mental illness diagnostically in a narrow way with just five or six discrete diagnoses, we would be under-inclusive. This would exclude some people who may not fit within the specified diagnostic categories, but who nevertheless may be profoundly disabled."). Schizophrenia has a diverse and yet undetermined causality. *See* www.NAMI.org ("Scientists still do not know the specific causes of schizophrenia, but research has shown that the brains of people with schizophrenia are different, as a group, from the brains of people without the illness. Like many other medical illnesses such as cancer or diabetes, schizophrenia seems to be caused by a combination of problems including genetic vulnerability and environmental factors that occur during a person's development.") (last visited Oct. 8, 2006). And the illness is manifest by a variety of symptoms: Overt symptoms, such as delusions and hallucinations; disorganized systems, such as confused thinking, speech, and behavior; and negative symptoms, such as emotional flatness, lack of expression, and an inability to start and complete activities, all support a diagnosis of schizophrenia. *See* www.NAMI.org ("No one symptom positively identifies schizophrenia. All of the symptoms of this illness can also be found in other brain disorders."); *see generally* National Institute of Mental Health, *Schizophrenia*, available at www.nimh.nih.gov/publicat/schizoph.cfm (last visited Oct. 8, 2006).

But not all of these symptoms impair a prisoner's ability to be "aware of the punishment they are about to suffer and why they are to suffer it." *See Ford*, 477 U.S. at 422 (Powell, J., concurrence). Emotional flatness or lack of expression, for example, has little to say, beyond suggesting the presence of other symptoms of schizophrenia, about a person's ability to comprehend a State's reason for execution or the fact of execution itself. Even overt symptoms such as hallucinations and delusions, and disorganized symptoms such as loose association, may not render a prisoner incompetent to be executed unless those

(Continued on following page)

A prisoner like Ford, who does not believe he will die and who fails to appreciate the finality of execution, never internalizes punishment and does not acknowledge the payback to society manifest in execution. Likewise, a prisoner like Panetti, who believes he is being executed for preaching the Gospel – an affront to forces of darkness wholly beyond social reality – never internalizes that his execution is remuneration to society. As the APA stresses, prisoners suffering from mental impairments like Barnard and Panetti should not be deemed competent for execution under *Ford*. But they *are* in the Fifth Circuit.

A legal test measuring a death sentenced inmate's competency to be executed cannot be inherently inconsistent with medical knowledge, practice and standards. When a court distinguishes between mentally ill prisoners based on a parsing of words or a subjective choice from a variety of dictionary definitions – distinctions that make no medical sense – a court undermines the expert evaluations upon which the competency hearing itself is based, and thus undercuts the reliability of the determination. The Fifth Circuit's parsimonious interpretation of *Ford* thwarts the views of the qualified physicians who examined Scott Panetti, and, thereby, renders the competency determination unreliable.

*Amici* endorse the APA's interpretation of the *Ford* standard as in accord with the retributive rationale adhered to in *Ford* and as a proper definition of the range of debilitating mental illness that a majority of the Court

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symptoms directly impair the prisoner's ability to appreciate the finality of the execution and to acknowledge the retributive nature of the punishment, the execution as payback to society for the crime the prisoner committed.

and Justice Powell believed the Eighth Amendment protects. *Amici* urge this Court to grant certiorari to address the Fifth Circuit Court of Appeals' erroneous interpretation and application of Justice Powell's standard.

## CONCLUSION

WHEREFORE, for the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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# In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner*,

versus

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF NATIONAL ALLIANCE FOR THE MENTALLY ILL (NAMI)

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## INTEREST OF AMICUS CURIAE[1]

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of persons living with serious mental illness and their families. Founded in 1979, NAMI has become the nation's voice on mental illness, a national organization including NAMI organizations in every state and in over 1,100 local communities across the country, who join together to meet the NAMI mission through advocacy, research, support, and education. NAMI is dedicated to the eradication of mental illnesses and to the improvement of the quality of life of all whose lives are affected by these diseases. NAMI joins this brief in its belief that education and understanding about mental illness at all levels of judicial and legal systems is crucial to the appropriate disposition of cases involving offenders suffering from mental illness.

## REASONS THE WRIT SHOULD BE GRANTED

### I. INTRODUCTION

Twenty years ago, this Court heard the case of Alvin Ford, a schizophrenic death row inmate. Ford was delusional; he firmly and falsely believed that he could not be executed. Ford's attorneys argued that the Eighth Amendment prohibits the execution of persons who are incompetent or insane. This Court agreed. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Justice Powell's

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

concurring opinion, which sought to "determine the precise definition" of "the category of defendants defined by their mental state" for whom the Eighth Amendment bars execution, *id.* at 419, provided what most lower courts now recognize as the standard for determining whether a State may execute a mentally ill or cognitively impaired prisoner. *See Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). According to Justice Powell:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly . . . the Eighth Amendment forbids the execution only of those who are unaware of [1] the punishment they are about to suffer and [2] why they are to suffer it.

*Ford*, 477 U.S. at 422 (Powell, J., concurring) (emphasis added).[2]

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[2] In Ford's support, organizations of mental health professionals, including the American Psychiatric Association and the American Psychological Association entered as *amici curiae*, to ensure that "the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination." Brief of Amicus Curiae for the American Psychiatric Association, *Ford v. Wainwright*, No. 85-5542 (1985); *see* Brief of Amici Curiae for the American Psychological Association and Florida Psychological Association, *Ford v. Wainwright*, No. 85-5542 (1985). The *amici* did not express opinion on the existence of an Eighth Amendment right or on the appropriate language for a governing legal standard; "resolution on those matters," one *amicus* wrote, "turns on considerations as to which [it] possesses no special expertise." *Id.* at 6. *Amici* simply urged that if there was a right protecting the insane from execution, the Court must not "denigrate" that right by skirting reliability of the evaluations upon which competency-to-be-executed determinations would rely. *See id.* at 7.

The Eighth Amendment categorical bar against executing incompetent persons – if it is to be applied fairly and reliably – is compromised by the Fifth Circuit's interpretation and application of the competency to be executed standard. In the past year, the American Psychiatric Association, the American Psychological Association, and the American Bar Association all have adopted resolutions or position statements addressing the execution of prisoners who suffer from severe mental illness. The American Psychiatric Association has publicly expressed concern over the Fifth Circuit's interpretation of the *Ford* standard, seeing in it "confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution." American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005); *see* American Bar Association, Resolution 122A (Aug. 8, 2006). *Amici* share this concern. The important issue presented by this case is whether the competency to be executed standard currently used by the Fifth Circuit is under-inclusive in a constitutionally offensive manner. *Amici* submit that it is.

*Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006) is a striking case, not only because of the severity of petitioner's mental illness, his farcical self-representation in the fiasco that served as his trial, and the widespread media coverage the case has received (*see, e.g.*, Blumenthal & Liptak, *Judging Whether a Killer Is Sane Enough to Die*, N.Y. Times (June 2, 2006)), but because unlike many cases involving testimony of psychiatric diagnosis and opinion, the experts agree that Panetti is severely mentally ill. In fact, they agree that Panetti suffers from schizophrenia, the most debilitating mental illness. The focus of this case, therefore, lies not in a battle of the experts as to whether Scott Panetti is severely mentally

ill, he clearly is and there is no dispute about it. The issue is whether his schizophrenia renders him incompetent to be executed; therefore, the focus of this brief is on the Fifth Circuit's interpretation and implementation of the constitutional mandate of *Ford*. *See Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006).

*Amici* have two central concerns. The first is the failure of the Fifth Circuit's competency to be executed standard to comport with the retributive rationale for the right espoused in *Ford*. *See* Petitioner's Brief at 24-32. The second concern, which is more significant to mental health professionals and organizations, is the fact that the Fifth Circuit's standard draws medically arbitrary distinctions between severely mentally ill persons. For both reasons, the Fifth Circuit's errant application of *Ford* wrongly and arbitrarily renders severely mentally ill prisoners subject to execution. More specifically, *Amici* are concerned here with death sentenced prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the fact that they will be executed and/or the actual reason for their execution. The Fifth Circuit's interpretation of *Ford* wrongly excludes this set of prisoners from the Eighth Amendment category established in *Ford*.

*Amici* begin by explaining the delusional belief systems characteristic of schizophrenia. We then discuss how the Fifth Circuit's interpretation of *Ford* fails to take these significant impairments into account, specifically with regard to Mr. Panetti. Finally, we discuss a proper interpretation of *Ford*, one that was recently articulated and embraced by the American Psychiatric Association.

## II. SCHIZOPHRENIA & DELUSIONAL BELIEF SYSTEMS

Within the set of prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the finality of their execution and the actual reason for the execution, the most prevalent affliction, and that which affects Mr. Panetti, is schizophrenia. The clinical diagnosis of schizophrenia involves a finding of one of the following symptoms: (a) thought echo, thought insertion or withdrawal, or thought broadcasting; (b) delusions of control or influence or delusional perceptions; (c) hallucinatory voices; and (d) persistent delusions of other kinds that are culturally inappropriate and completely impossible. World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (Geneva, 1993). The diagnostic criteria for schizophrenia under the DSM-IV likewise involve a finding of one or two (depending upon severity) of the following symptoms: (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly organized or catatonic behavior; (5) negative symptoms such as affective flattening. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Wash. DC, 1994). As the criteria show, perceptual and thought disorders are the core elements of the clinical definition of schizophrenia:

> The feature common to all manifestations of schizophrenia thought disorder is that patients think and reason on their autistic terms according to *their own* intricate private rules of *logic*. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But

> their thought processes are strange and do *not* lead to conclusions based on *reality*. . . .

Cancro & Lehmann, *Schizophrenia: Clinical Features*, in Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 7th ed., vol. 1 (2000), at 1189 (emphasis added).

The thought disorders – delusions – that underlie schizophrenia are often persistent. And often, from the perspective of everyone other than the patient, they do not equate with logic. *See* WHO, *ICD-10*. By definition, delusions are "false ideas that cannot be corrected by reasoning and that are idiosyncratic for the patient (i.e., not part of the patient's cultural environment). *Id.* at 1187; *see also Mental Health: A Report of the Surgeon General* (2002) ("Delusions are firmly held erroneous beliefs due to distortions or exaggerations of reasoning and/or misinterpretations of perceptions or experiences.") (internal quotation and citation omitted). Most commonly, the delusions experienced by a person suffering from schizophrenia involve a scenario of persecution accompanied by grandeur, battles between good and evil involving high stakes. Cancro & Lehmann at 1187-88. As the National Institute of Health explains:

> Delusions are false personal beliefs that are not part of the person's culture and do not change, even when other people present proof that the beliefs are not true or logical. People with schizophrenia can have delusions that are quite bizarre, such as believing that neighbors can control their behavior with magnetic waves, people on television are directing special messages to them, or radio stations are broadcasting their thoughts aloud to others. They may also have delusions of grandeur and think they are famous

> historical figures. People with paranoid schizophrenia can believe that others are deliberately cheating, harassing, poisoning, spying upon, or plotting against them or the people they care about. These beliefs are called delusions of persecution.

NIMH, *Schizophrenia*, NIH Publication No. 3517 (2004).

In sum, two defining features characterize the delusions that make up schizophrenia: first, the delusions are not based on the patient's cultural environment – in broad terms, they are not based on reality; second, the delusions are firmly held beliefs that are not subject to change, even in the presence of true, logical proof. Neither feature, however, factors into the Fifth Circuit's interpretation of *Ford*.

## III. THE FIFTH CIRCUIT'S MISGUIDED INTERPRETATION OF *FORD*

The Fifth Circuit maintains that it uses Justice Powell's competency to be executed standard in evaluating *Ford* claims. *Panetti*, 448 F.3d at 819 (citing *Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988)). But the Court of Appeals' interpretation of what it means for a prisoner to be "unaware of the punishment they are about to suffer and why they are to suffer it," *Ford*, 477 U.S. at 422 (Powell, J., concurring), only partially encompasses the mentally ill individuals Justice Powell had in mind. The Fifth Circuit's understanding of the competency to be executed standard is essentially this: A severely mentally ill prisoner is competent to be executed if he is merely aware of the reason the State has given for executing him. According to the Court of Appeals, a prisoner need not "rationally understand" or comprehend the reason for his

execution, he need only be "aware" of it. *Panetti*, 448 F.3d at 819 (citing *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994)).

In *Barnard*, the Fifth Circuit found a prisoner competent who knew he was to be executed on a certain day, and who knew he was to be executed for killing a boy during a robbery. The court deemed it of no consequence that the prisoner simultaneously believed his pending execution was the final chapter of a delusional conspiracy against him rather than punishment for felony murder. 13 F.3d at 876. In this case, the court concluded that Panetti's competency claim was governed by *Barnard*. And the court ruled Panetti competent because Panetti can parrot that the State told him he would be executed for killing his wife's parents. That, according to the court below, satisfied the "nature, pendency, and purpose" test the court applied in *Barnard*. *Panetti*, 448 F.3d at 819.

### A. The Factual Discrepancy Between *Barnard* And *Ford*

*Barnard*, however, is fundamentally at odds with *Ford*. The starkest evidence that the line the Fifth Circuit has drawn is not one this Court intended is that, by the Fifth Circuit's approach, the symptoms alleged by Alvin Ford, whose claims gave rise to the governing standard, would not make the constitutional cut. In response to assertions that he would be executed, Alvin Ford acknowledged, "I know there is some sort of death penalty." *Ford*, 477 U.S. at 403. But Ford also believed that he had eliminated executions and therefore could not suffer the death penalty. *Id.* In essence, Ford's response when told of his impending execution was, "I know you say there is a death

penalty by which you will execute me, but I do not believe it." Ford's belief that he had eliminated executions, coupled with his perception that he "owned the prisons and could control the Governor through mind waves," *id.*, was firmly at odds with reality.

Contrary to *Barnard*, a plurality of this Court viewed the dichotomy between reality and Ford's delusional belief as evidence of incompetence, justifying a remand to state court for a competency hearing. *Id.* at 410 ("Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution."). And Justice Powell, reviewing the facts under his newly announced standard for competence to be executed, asserted that if the facts Ford presented were accurate, "petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated." *Id.* at 422 (Powell, J., concurring).[3] For both the majority and concurring opinions in *Ford*, execution could only be justified if it had retributive value. And that value, in the Court's view, was lost on prisoners like Ford, who did not believe and therefore had not internalized the finality of execution.

The facts of *Ford* display the flaws in the Fifth Circuit's interpretation of Justice Powell's standard. That court fails to take into account precisely the thought impairments and the resulting impossible beliefs that the

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[3] Unlike *Ford*, Panetti's delusional belief system affects his ability to appreciate the reason "why" he will be executed, rather than, as in Ford's case, the fact of execution itself.

*Ford* Court found indicative of incompetence. The Fifth Circuit ignores the medical condition, deemed relevant in *Ford*, in which dichotomous belief systems impair mentally ill prisoners from internalizing "why" they will be executed.[4]

### B. Panetti Deserves Protection Under *Ford*, But Is Denied It Under *Barnard*

Mr. Panetti's schizophrenic symptoms place him well within the category of severely mentally ill persons whose executions are prohibited by the Eighth Amendment. Since 1986 (six years prior to the crime), Panetti has been diagnosed repeatedly as suffering from schizophrenia or schizoaffective disorder.[5] No diagnosis has contradicted

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[4] The Fifth Circuit's decision in *Lowenfield*, cited by the Fifth Circuit as the case in which it adopted Justice Powell's standard, treads much more closely to *Ford* than *Barnard*. In *Lowenfield*, the Fifth Circuit held that a diagnosis by a single psychologist that the defendant was a paranoid schizophrenic did not present a threshold showing of incompetence to be executed under *Ford*. 843 F.3d at 187. *Lowenfield* characterized the *Ford* standard as whether the prisoner "'comprehends the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford*, 477 U.S. at 417).

[5] *See* Scott Panetti's medical records, admitted as State Exhibits 1 through 6 at the second competency-to-stand-trial proceeding in 1994: Panetti was diagnosed at Starlite Village Hospital with chronic undifferentiated schizophrenia in April 1986; diagnosed at Kerrville State Hospital with schizophrenia in mid-May 1986; diagnosed at Waco Veteran's Hospital with chronic undifferentiated schizophrenia in late May 1986; diagnosed at Tomah Veteran's Hospital with schizophrenia in July 1986; diagnosed at Starlite Village Hospital with schizophrenia in October 1986; diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in November 1986; and diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in 1992, just months before crime. Panetti

(Continued on following page)

that Panetti suffers from a schizophrenic condition.[6] Both doctors who examined Panetti to determine his competence to stand trial recognized schizophrenia and schizophrenic symptoms. *See* Petitioner's Brief at 4-7. Both agreed that Panetti's delusions and other symptoms would worsen if Panetti stopped taking antipsychotic medication, which he did shortly before representing himself at trial

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was also diagnosed at Cumberland Memorial Hospital with depression, brain dysfunction, auditory hallucinations, homicidal ideations, and delusions in August 1986; diagnosed at Northern Pines Unified Services Center as suffering from depression and suicidal ideation in September 1986; committed to Kerrville State Hospital in 1990 for homicidal behavior after threatening to kill himself, his wife, baby, and father-in-law, believing the citizens of Kerrville were plotting against him. These diagnoses are not inconsistent with the diagnoses of schizophrenia. Further, during the competency-to-be-executed proceedings, Dr. Conroy, a forensic psychologist, diagnosed Panetti as suffering from schizoaffective disorder, a form of schizophrenia. *See* transcript of federal district court competency-to-be-executed hearing, vol.1, at 14, 21-22 (*Amici* adopt Petitioner's citation form and will refer to the hearing transcript as "FH"). Dr. Cunningham, a clinical and forensic psychologist, testified that Panetti suffers from a disorder on the schizophrenic and/or schizoaffective spectrum, that he is actively psychotic. *See Panetti v. Dretke*, 401 F.Supp.2d 702, 707 (W.D. Texas 2004) (finding Panetti suffers from "some form of mental illness", which doctors had characterized as schizoaffective disorder).

[6] Of the experts appointed during the competency-to-be-executed proceedings, Dr. Anderson, a court-appointed forensic psychiatrist, refused to diagnose schizophrenia because she did not believe the diagnosis relevant to the *Ford* standard (Dr. Anderson also did not reach a conclusion as to whether Panetti was competent to be executed.). 2 FH 40-41. Dr. Parker, a court-appointed clinical psychologist, found that Panetti has "serious psychological problems." 1 FH at 134. Dr. Rosin, a psychologist, recognized that Panetti suffered from a fixed delusional system. 1 FH at 82, 89-90. And Dr. Silverman, a psychiatrist, testified that the dosages of medication that Panetti was taking before trial were "diagnostic of psychotic illness." 1 FH at 122.

and which he never resumed.[7] *See* Petitioner's Brief at 8-10. And each of the mental health experts who testified during the District Court competency hearings agreed (whether they reported a diagnosis of schizophrenia or not) that Panetti suffers from a fixed delusional belief system: While Panetti is aware of the State's stated reason for executing him, he believes that the State, in conjunction with forces of darkness, wants to kill him for preaching the Gospel. *See Panetti*, 401 F.Supp.2d at 708-09; *id.* at 708, n.3. Panetti's mind holds a composite belief that is completely impossible.

Under *Barnard*, this dichotomy – and more important, this tension – between reality and Panetti's delusion is irrelevant. But under *Ford*, the fact that Panetti believes the State's explanation for his execution is a "sham," (1 FH

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[7] That Panetti was permitted to represent himself after going off the antipsychotic medication he was taking when found competent to stand trial is also profoundly troubling to *Amici*. *See* Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 Cath. U. L. Rev. 1153, 1163-65 (2005); *see also* Jodi L. Vilojen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26:5 Law & Hum. Behav. 481, 497 (2002) ("In comparison to defendants with other types of psychotic disorders . . . defendants with schizophrenia demonstrated considerable more impairment on legal abilities. This finding is consistent with the high rates of cognitive and functional impairments in individuals with schizophrenia."). Two doctors who had previously treated Panetti, and who had previously diagnosed him as suffering from schizophrenia, watched the trial. Dr. F. E. Seale who treated Panetti at Starlite Village Hospital in 1986 stated that during the trial Panetti was suffering from "delusion," "totally out of touch with reality," and "obviously mentally ill." Affidavit of F. E. Seale, Ph.D. Dr. Wolfgang Selck, who treated Panetti at Starlite Village Hospital in April 1986, stated that Panetti's inappropriate and grandiose self-representation at trial was the product of delusion and constituted a "break from reality." Affidavit of Wolfgang Selck, Ph.D.

at 25; *see* Petitioner's Brief at 20), a pretextual explanation by authorities to cover up the forces of darkness' plot to stop his preaching of the Gospel, eviscerates the retributive benefit of executing the man. It is evident that Panetti, though aware of his legal proceedings, has not internalized "the nature of the debt that [he] owe[s] society." Christopher Slobogin, *Minding Justice: Laws That Deprive People With Mental Disability of Life and Liberty*, at 94 (Harvard University Press, 2006). In accord with the retributive rationale for the Eighth Amendment right adopted by the *Ford* majority and concurring opinions, Panetti's express disbelief of the State's reason is clear evidence that he is incompetent.

## IV. THE PROPER INTERPRETATION OF THE *FORD* STANDARD: MERE "AWARENESS" IS NOT A MEANINGFUL REQUIREMENT FOR A STANDARD PREVENTING EXECUTION OF THE INSANE

This case exemplifies why mere "awareness," the test applied by the Fifth Circuit, is not a meaningful requirement for determining whether to execute prisoners who are severely mentally ill. The mere awareness test makes no sense when applied to a prisoner who is plagued by delusions of grand persecution, as severely mentally ill, schizophrenic individuals like Mr. Ford and Mr. Panetti very often are. From the perspective of the mental health profession, and with regard to diagnoses of schizophrenia and related mental illnesses in particular, the distinction that the Fifth Circuit draws between "rational understanding" and "awareness," *see Panetti*, 448 F.3d at 819-21

(citing *Barnard*), is false. A severely mentally ill patient who lacks "actual awareness," lacks awareness, period.[8] Hence the concern of the American Psychiatric Association over the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

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[8] This is not a matter of epistemology about what it means to "know" – certainly there are different types of knowledge, in linguistic terms and in legal standards, and it is the law's provenance to determine the meaning of "knowledge" or "awareness" in any given context. Nor does the issue here involve a metaphysical debate over the nature of life and death. *Cf. Walton v. Johnson*, 440 F.3d 160, 179 (4th Cir. 2006) (Wilkinson, J. concurring) ("Judges called upon to interpret the Eighth Amendment may not engage in metaphysical inquiries under the guise of constitutional interpretation. . . . The Powell test appreciates that the Constitution does not countenance judicial forays into inherently philosophical arenas."). *Amici*'s contention is simply that the *Barnard* test excludes persons who are in fact incompetent to be executed.

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also *must "appreciate" its personal application in the offender's own case* – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (emphasis added) (citations omitted); *accord Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1115 (2005), § 3(a); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1173 (2005).

As the APA emphasizes, mere "awareness" of "the nature and purpose of punishment" has little meaning in the context of an individual suffering from delusional belief systems. *Amici* agree with the APA that a meaningful (and faithful) interpretation of the *Ford* standard requires more; a mentally ill individual must "appreciate" the "personal application" of the punishment "in the offender's own case." To be competent, a prisoner must have the capacity to reflect on the execution as punishment for the crime

committed and *internalize the execution as payback to society*. This requires that a condemned inmate have enough grasp of reality to believe that he really will die, and enough to believe that the real reason he will die is because of his crime.[9]

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[9] It is important to emphasize that *Amici*'s position is not that *all* prisoners diagnosed with schizophrenia are categorically incompetent for execution. Nor is *Amici*'s position that *Ford* exempts from execution *only* those who have been diagnosed with schizophrenia or a particular mental illness. *See* Honberg, 54 Cath. U. L. Rev. at 1166 ("If we define mental illness diagnostically in a narrow way with just five or six discrete diagnoses, we would be under-inclusive. This would exclude some people who may not fit within the specified diagnostic categories, but who nevertheless may be profoundly disabled."). Schizophrenia has a diverse and yet undetermined causality. *See* www.NAMI.org ("Scientists still do not know the specific causes of schizophrenia, but research has shown that the brains of people with schizophrenia are different, as a group, from the brains of people without the illness. Like many other medical illnesses such as cancer or diabetes, schizophrenia seems to be caused by a combination of problems including genetic vulnerability and environmental factors that occur during a person's development.") (last visited Oct. 8, 2006). And the illness is manifest by a variety of symptoms: Overt symptoms, such as delusions and hallucinations; disorganized systems, such as confused thinking, speech, and behavior; and negative symptoms, such as emotional flatness, lack of expression, and an inability to start and complete activities, all support a diagnosis of schizophrenia. *See* www.NAMI.org ("No one symptom positively identifies schizophrenia. All of the symptoms of this illness can also be found in other brain disorders."); *see generally* National Institute of Mental Health, *Schizophrenia*, available at www.nimh.nih.gov/publicat/schizoph.cfm (last visited Oct. 8, 2006).

But not all of these symptoms impair a prisoner's ability to be "aware of the punishment they are about to suffer and why they are to suffer it." *See Ford*, 477 U.S. at 422 (Powell, J., concurrence). Emotional flatness or lack of expression, for example, has little to say, beyond suggesting the presence of other symptoms of schizophrenia, about a person's ability to comprehend a State's reason for execution or the fact of execution itself. Even overt symptoms such as hallucinations and delusions, and disorganized symptoms such as loose association, may not render a prisoner incompetent to be executed unless those

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A prisoner like Ford, who does not believe he will die and who fails to appreciate the finality of execution, never internalizes punishment and does not acknowledge the payback to society manifest in execution. Likewise, a prisoner like Panetti, who believes he is being executed for preaching the Gospel – an affront to forces of darkness wholly beyond social reality – never internalizes that his execution is remuneration to society. As the APA stresses, prisoners suffering from mental impairments like Barnard and Panetti should not be deemed competent for execution under *Ford*. But they *are* in the Fifth Circuit.

A legal test measuring a death sentenced inmate's competency to be executed cannot be inherently inconsistent with medical knowledge, practice and standards. When a court distinguishes between mentally ill prisoners based on a parsing of words or a subjective choice from a variety of dictionary definitions – distinctions that make no medical sense – a court undermines the expert evaluations upon which the competency hearing itself is based, and thus undercuts the reliability of the determination. The Fifth Circuit's parsimonious interpretation of *Ford* thwarts the views of the qualified physicians who examined Scott Panetti, and, thereby, renders the competency determination unreliable.

*Amici* endorse the APA's interpretation of the *Ford* standard as in accord with the retributive rationale adhered to in *Ford* and as a proper definition of the range of debilitating mental illness that a majority of the Court

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symptoms directly impair the prisoner's ability to appreciate the finality of the execution and to acknowledge the retributive nature of the punishment, the execution as payback to society for the crime the prisoner committed.

and Justice Powell believed the Eighth Amendment protects. *Amici* urge this Court to grant certiorari to address the Fifth ~~Circuit~~ Court of Appeals' erroneous interpretation and application of Justice Powell's standard.

## CONCLUSION

WHEREFORE, for the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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November 13, 2006

(13)

No. 06-6407

# In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## JOINT APPENDIX VOLUME I


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## RELEVANT DOCKET ENTRIES

216TH JUDICIAL DISTRICT COURT
GILLESPIE COUNTY, TEXAS
DOCKET NO. 3310
STATE v. PANETTI

| | |
|---|---|
| 12/10/2003 | Defendant's Motion to Determine Competency to Be Executed. |
| 12/23/2003 | Order Denying Applicant's Motion to Determine Competency to Be Executed. |
| 2/4/2004 | Scott Panetti's Renewed Motion to Determine Competency to Be Executed. |
| 2/19/2004 | *Ex parte* Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings. |
| 2/19/2004 | Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings. |
| 2/19/2004 | Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of Ford. |
| 2/19/2004 | *Ex parte* Motion for Prepayment of Funds to Hire an Investigator to Assist Defense Counsel. |
| 2/19/2004 | Motion for Member of Defense Team to Be Present During Expert Examinations of Scott Panetti. |
| 2/19/2004 | Defendant's Motion asking Court to Refrain from Setting New Execution Date. |
| 2/19/2004 | Defendant's Motion for Discovery. |

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| 2/19/2004 | Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts. |
| 2/19/2004 | Motion to Transcribe All Proceedings Related to Competency Determination under Article 46.05. |
| 2/19/2004 | Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti. |
| 2/26/2004 | Order (granting Renewed Motion to Determine Competency to Be Executed, staying execution, and appointing Dr. Mary Anderson and Dr. George Parker to examine defendant). |
| 3/4/2004 | Defendant's Motion to Reconsider. |
| 3/15/2004 | Order to Disclose Records. |
| 4/1/2004 | Order Compelling Production of Documents. |
| 4/8/2004 | Order Compelling Production of Documents. |
| 4/28/2004 | Joint Report of Drs. Parker and Anderson. |
| 5/14/2004 | Letter to counsel from Judge Stephen Ables (noting appointed experts' opinion that Mr. Panetti is competent and ordering Mr. Panetti's counsel to file any other matters by 5/21/04) |
| 5/21/2004 | Scott Panetti's Objections to Experts' Report, Renewed Motion for Funds to Hire Mental Health Expert and Investigator, Renewed Motion for Appointment of Counsel, and Motion for Competency Hearing (File Stamped May 24, 2004). |
| 5/26/2004 | Order Regarding Competency to be Executed. |

US DISTRICT COURT
WESTERN DISTRICT OF TEXAS (AUSTIN)
CIVIL DOCKET NO. 1:04-CV-042
PANETTI v. DRETKE

| Date Filed | # | Docket Text |
|---|---|---|
| 01/26/2004 | 1 | Petition by Scott Louis Panetti for writ of habeas corpus raising ripe claim of incompetency to be executed. |
| 01/26/2004 | 2 | Motion by Scott Louis Panetti to stay execution (scheduled 2/5/04). |
| | | * * * |
| 01/28/2004 | 3 | Order denying motion to stay execution (scheduled 2/5/04). |
| 01/30/2004 | 4 | Motion by Doug Dretke to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed. |
| | | * * * |
| 01/30/2004 | 6 | Motion by Scott Louis Panetti to appoint expert (psychiatrist). |
| 01/30/2004 | 7 | Motion by Scott Louis Panetti for reconsideration (Court's order dated 1/28/04 on motion to stay). |
| 01/30/2004 | 8 | Second Motion by Scott Louis Panetti to stay execution. |
| 01/30/2004 | 9 | Order denying motion to stay execution, granting motion for reconsideration (Court's order dated 1/28/04 on motion to stay), denying motion to appoint expert (psychiatrist). |

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| 02/04/2004 | 10 | Second Motion by Scott Louis Panetti for reconsideration. |
| 02/04/2004 | 11 | Order granting motion for reconsideration, granting motion to stay execution for 60 days to allow state court to reconsider his motion u.. :er Article 46.05 of Texas Code of Criminal Procedure challenging his competency to be executed in light of evidence of Panetti's current incompetency to be submitted to this and the state court. |

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| 06/07/2004 | 15 | Order that petitioner is granted 15 days to prepare motions related to his incompetency-to-be-executed claim. |
| 06/21/2004 | 16 | Motion by Scott Louis Panetti for appointment of counsel. |
| 06/21/2004 | 17 | Motion by Scott Louis Panetti for authorization of funds for expert and investigative assistance, statement of the need for confidentiality, and for leave to seal ex parte application for funds. |
| 06/21/2004 | 18 | Motion by Scott Louis Panetti for discovery. |
| 06/21/2004 | 19 | SEALED Motion by Scott Louis Panetti for authorization of funds for expert assistance. |
| 06/21/2004 | 20 | SEALED Motion by Scott Louis Panetti for authorization of funds for investigative assistance. |

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| 07/01/2004 | 21 | Response by Doug Dretke in opposition to motion for authorization of funds for investigative assistance, motion for authorization of funds for expert assistance, motion for discovery. |
| 07/12/2004 | 22 | Order ... hearing [on] motion for authorization of funds for investigative assistance for 10:00 7/19/04, motion for authorization of funds for expert assistance for 10:00 7/19/04, motion for discovery for 10:00 7/19/04, motion for authorization of funds for excerpt and investigative assistance, statement of the need for confidentiality for 10:00 7/19/04, motion for leave to seal ex parte application for funds for 10:00 7/19/04, motion for appointment of counsel for 10:00 7/19/04, motion to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed ... for 10:00 7/19/04. |

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| 07/20/2004 | 23 | Order granting motion for discovery subpoenas duces tecum to be issued to TX Dept. of Criminal Justice and Gillespie County, Kerry [sic] County and Bell County Jails. |
| 07/20/2004 | 24 | Order denying motion to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed ... , granting motion for appointment of counsel, granting motion for authorization of funds for expert and investigative assistance, |

| | | |
|---|---|---|
| | | statement of the need for confidentiality, granting motion for leave to seal ex parte application for funds, granting motion for authorization of funds for expert assistance, granting motion for authorization of funds for investigative assistance, setting evidentiary hearing for 9:30 8/23/04. |
| | | * * * |
| 08/11/2004 | 31 | Motion by Scott Louis Panetti for discovery and subpoenas of files of state appointed experts. |
| | | * * * |
| 08/19/2004 | 34 | Order granting motion for discovery and subpoenas of files of state appointed experts, that clerk issue subpoena for Dr. George Parker . . . , for Dr. Mary Anderson . . . , that petitioner provide clerk with addresses for Dr. Parker and Dr. Anderson . . . . |
| | | * * * |
| 09/07/2004 | | Evidentiary hearing held; to continue 9/8/04. |
| | | * * * |
| 09/08/2004 | | Evidentiary hearing held; concluded; supplemental briefs in 2 or 3 days. |
| | | * * * |
| 09/10/2004 | 41 | Post-Hearing Brief by Scott Louis Panetti. |
| 09/29/2004 | 42 | Order denying petition for writ of habeas corpus and staying case pending outcome of appeal. |
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| 10/21/2004 | 43 | Notice of appeal by Scott Louis Panetti. |
| 10/21/2004 | 44 | Motion by Scott Louis Panetti for certificate of appealability. |

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| 11/29/2004 | 47 | Order granting in part as to Issue One of the Motion for Certificate of Appealability; Denied as to Issue Two of the Motion for certificate of appealability. |

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US COURT OF APPEALS FOR THE FIFTH CIRCUIT
DOCKET NO. 04-70045
PANETTI v. DRETKE

| | |
|---|---|
| 3/14/05 | Appellant's Brief filed by Appellant Scott Louis Panetti. |
| | * * * |
| 3/21/05 | Amicus curiae brief filed by . . . Advocacy Inc., Mental Health [Association in Texas], . . . National Alliance [for the Mentally Ill], . . . Texas Appleseed. |
| | * * * * |
| 5/16/05 | Appellee's Brief filed by Appellee Doug Dretke. |
| 6/1/05 | Reply brief filed by Appellant Scott Louis Panetti. |
| | * * * |
| 12/13/05 | Oral argument heard. |
| 5/9/06 | Opinion filed. |
| 5/9/06 | Judgment entered and filed. |
| 5/22/06 | Petition filed by Appellant Scott Louis Panetti for rehearing en banc. |
| 6/8/06 | Court Order filed denying petition for rehearing en banc |
| 6/16/06 | Mandate issued. |
| | * * * |

**DEFENDANTS EXHIBIT 44**

**9-20-95**

**E. LEE SIMES, M.D.** (512) 997-8773

PSYCHIATRY 150 E. Main, Suite 202
Fredericksburg, Texas 78624

PSYCHIATRIC EVALUATION

11-6-92

Patient: Scott Louis Panetti

Requesting Agency: Judge Steve Ables
216th Judicial District
Gillespie County, Texas

Source of Information: Interview with Scott Louis Panetti.

Reason For Evaluation: Court ordered to determine competency to stand trial.

Present History: Mr. Panetti is a 34 year old male seen at the Fredericksburg jail and examined for competency to stand trial. The interview was focused upon the issue of competency, so much background information at this time was not obtained. Mr. Panetti stated that he is in jail charged with two capitol [sic] murder offenses. When asked to explain the meaning of capitol murder he states "it is as if you have killed a policeman", and elaborated that it was an important type of murder. He seemed to grasp the severity of the charges against him.

Mr. Panetti initiated the conversation by stating that "Scott is away". He then described "Will" being here. "Will" he described is his mediator. He also described a persona called "Wounded Sun Bird", which evidently is evidenced by a tattoo which he has. He knew that he was in jail and that the jail was located in Fredericksburg. He knew that the date was close to All Saints Day, but felt that it was

1991. He knew that he had entered the jail sometime at the end of August or first of September. While he did not graduate from high school he did receive a GED. He stated that he could read and write and writes poetry as a hobby. He felt that the President was Reagan, but knew the Vice-President was someone who they "make jokes about". He knew that his parents were dairy farmers and that part of his family holdings included a dairy farm in Wisconsin. He himself, he states, has mainly made a living as a cowboy for most of his adult life. He described himself as anxious, frustrated, depressed and somewhat hopeless about the future. He states that he spends most of his time studying the Bible and then would begin describing various passages in the Bible which relate to him. This religiosity appeared to have delusional significance. He spoke much about his problem with alcohol and that he had been involved in AA for many years. He also described a mental disorder and that he was on medications. A subsequent list of medications from the jail staff included: Perphenazine 4 mg. 2 tablets three times a day, 8 tablets at bedtime; Temazepam 15 mg. 1-2 at bedtime; Benztropine 2 mg. 1 at bedtime; Amitriptyline 25 mg. 4 at bedtime; Erythromycin 2 percent topical solution every 12 hours. The physicians name on the bottles was Dr. Lennhoff. He states that his psychiatric disorders have led to several hospitalizations. He also states that alcohol is a significant problem and related this to a persona named "Sarge". He described the character "Will" as the mediator between Scott and "Sarge". He described having four children, three by a Jane Luckenbach, and one by a Alverdo Panetti. He appeared to grasp the meaning of competency stating that he hoped that he was competent, so that the legal system would continue to move, as he described it, and therefore resolve his present circumstance. He denied feeling suicidal, but stated that if his hopelessness worsened he might

begin to have such feelings. He stated that he is being visited by a local Preacher of a Presbyterian Church and that these visits are a comfort to him. When questions about his estate were broached he described his family's dairy farm, his jeep and his saddle, his bed role and his blacksmithing tools. As mentioned, he writes poetry and is able, he states, to concentrate and complete his poems and to memorize them. He stated that his income is from a disability pension from social security for a mental disorder. He appeared to have good insight into the fact that his medication helped him from "twisting off" or getting psychiatrically sick, as he related: that he was afraid not to take the medications: that he appeared to know some usual side effects of the medication: and that alcohol worsened his overall mental state. He knew the names of two treating psychiatrists, Dr. Warner and Dr. Lennhoff, both of the VA system. When asked questions about judgement such as a fire in a crowded movie theater he responded appropriately, "it would throw widespread panic". When asked about a stamped letter near a mail box he stated that he would assume someone had dropped it, that they would want it mailed, and that he would therefore so mail it. He mentioned some allusions [sic] at times of seeing a glowing light. He also stated that at one time he saw Jesus in his cell and that, he does have, at times, auditory hallucinations of undescribed voices. He knew who is [sic] attorney was, knew him by name. He knew that the attorney had a creed of ethics, an oath, and knew that he was representing him in the present legal problems. He knew that the attorney practices law. He appeared to have insight into the different roles that an attorney plays, and he offhandedly joked that he did not know what his attorney would get out of such a situation as representing him on these present charges.

Mr. Panetti was seen twice on the same day. He was given some time in between the interviews to allow him to have a cigarette, relax and then certain questions were repeated to see his consistency and responses. He mentioned several times about some incidences where he was struck by lightning at the local Redstone Ranch. Where he was drowning when he fell in a pool. Where he was drowning while in the Navy. And while he was in a burn unit for electrocution while working for Central Texas Electric.

Mental Status Exam: General impressions: patient was seen at Fredericksburg jail with attorney present. Affect inappropriate, staring with a fixed stare seldom blinking his eyes. Mood concerned and apprehensive about the future. No gross disturbance of sleep. Thought; thought flow showed some looseness and tangentiality in thoughts. He denied significant depressive symptoms. No evidence of manic symptoms. He admitted to both visual and auditory hallucinations. He related chronic delusions. He appeared suspicious and paranoid. He denied present suicidal and homicidal thinking. His overall care of himself at this time appeared adequate. Orientation showed that he was oriented to his person, though he did ~~not~~ miscalculate his age by stating he was either 34 or 35; he was oriented to place. He was oriented to time in that he knew it was near Thanksgiving, that All Saints Day had just occurred, that it was the month of November but he said 1991; he appeared oriented to the circumstance of the examination. Under memory; his recent memory appeared intact; his recall memory basically appeared intact, he remembered two out three objects at five minutes, the object he missed was saying Roof rather than umbrella; his remote memory appeared intact. Calculations; he did serial 3 subtractions without significant mistakes. His intellectual function

appeared within the normal range. His cognition was distractable at times. His fund of knowledge was fair. His ability to abstract was quite concrete and personalized for proverb interpretation. His insight was fair to good. His reliability was open to question given the circumstances. His judgement for classic questions about fires in movies and mailing stamped letters was quite good and insightful. His cooperation overall was good.

Conclusion: Overall at this time this man appears to have chronic delusions, occasional hallucinations and an odd fragmentation of his personality in describing himself as several different people. He has a history of some traumatic injuries with possible near drownings, electrocutions and lighting strikes, but there does not appear to be substantial evidence of brain damage from these traumas. Despite his religiosity and his delusional thinking his overall story was quite consistent and insightful. He appeared to understand the charges against him, their significance, as well the significance of possible punishments that might result. He understood the circumstances as to why the charges were brought. He understood who his council was, appeared to relate with the council in a reasonable fashion despite his obvious mental difficulties. He appeared to understand his estate and his relationship with various people in his life. He appeared to be able to assist in his own defence and to process the information and questions given to him. He appeared to be able to retain the information from the first and second meetings and synthesized the information in a way that would allow him to expand on various issues. For these reasons, overall, he appears competent to stand trial.

Recommendations: At the time of this interview on 11-6-92 Mr. Scott Louis Panetti appears competent to stand trial.

Respectfully Submitted.
/s/ E. Lee Simes MD
E. Lee Simes, M.D.

ELS:kam

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| **SCOTT LOUIS PANETTI,** | § | |
| **Petitioner,** | § | |
| | § | |
| **V.** | § | |
| | § | **CIVIL CASE** |
| **WAYNE SCOTT, Director,** | § | **NO. A-99-CA-260SS** |
| **Texas Department of Criminal** | § | |
| **Justice, Institutional Division,** | § | |
| | § | |
| **Respondent.** | § | |

## AFFIDAVIT OF SCOTT MONROE

BEFORE ME, the undersigned authority, personally appeared Scott Monroe, who being duly shown by me, deposed as follows:

"My Name is Scott Monroe. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am an Attorney licensed to practice in the State of Texas. My State Bar Number is 14272700. I have been licensed in Texas since June 1979. My office is located at 317 Earl Garrett, Kerrville, Texas 78028. My office telephone number is (830) 896-2715.

I was appointed as the stand by Counsel for Scott Panetti at his capital murder trial. I was in Court during the hearing on June 22, 1995, when Scott asked the Judge to represent himself and fire Preston Douglas and Richard Mosty. I was not appointed until the next hearing on July 20, 1995. Scott Panetti asked the Judge to fire me at a hearing on August 8, 1995. One day Scott said I was fired

and late that day, he told me he changed his mind and I was not fired. At the hearing Scott advised the Court that I had been overstepping my bounds as standby counsel by doing things that I was not appointed to do. He did this in the form of accusations, implying that I was behaving inappropriately. In fact, the one or, two times that I probably did technically overstep bounds by doing leg work that I should not do, I did at Scott's request. Scott even commented that he knew he was asking me to do things that I was not supposed to do but he could really use my help.

Judge Ables set conditions on my stand by representation. As stand by Counsel, I was to take no action or give any advice to Scott unless he specifically asked. I attach a copy of the restrictions imposed on me by Judge Ables. In the Courtroom, Scott did not want me to sit at the counsel table with him unless there was more than one attorney for the State at the counsel table. He did not want the jury to think that he was getting help on his case. I sat in the spectator seats during the trial.

I worked on the case from July 1995 until the conclusion of the trial in September 1995. I observed Scott outside the Courtroom at the Jail and during the entire trial. In my opinion, Scott was not competent to stand trial during the time I was the stand by Counsel. In my opinion, Scott was not competent to represent himself. Scott did not have a factual and a rational understanding of the capital murder proceedings. Scott was not able to assist me and I was not able to assist him due to his mental illness. Scott was paranoid of a big conspiracy that everyone was out to get him, He had to represent himself to prove insanity. Scott was not on any psychotropic medication during the trial. I talked to Scott to allow attorneys to

represent him. I literally begged him, but, it made no difference. I had his sisters and family try to talk to him to let the attorneys handle his case. He did not understand that he could not adequately represent himself.

Even though Judge Ables ordered me to take no action unless Scott specifically requested my help, I prepared information for him to prepare his capital murder case. I bought a Code of Criminal Procedure and Penal Code for Scott to have to read any law on his case. Scott did not want the Codes, he gave them back. I made a copy of an Overview of Capital Murder by Mark Stevens from a State Bar seminar for Scott. I made copies of all relevant sections of the Code of Criminal Procedure on voir dire of the capital venire, challenges for cause, pre-trial motions, evidence and punishment special issues. Scott did not use the information I prepared for him. I tried to outline the theory of the defense, but, Scott was only interested in his own show. I tried to discuss defense witnesses, but, Scott only wanted to visit with old friends, not prepare for trial. I tried to advise Scott areas not to ask about with State's witnesses, especially Sonya Alvarado, Scott was not able to use any advice I gave him. Nothing I told him made any difference. He did not understand the reasons for my advice and did not realize the effect of his decisions and actions.

At a meeting during jury selection, I advised Scott on several important issues on the confession, preservation of error, invoking the rule and general rules of voir dire. This was all way above Scott's head. It did not appear to make any sense to him. At a meeting on Scott's Motion to Disqualify Judge Ables, Scott would not tell me the reasons. We were in the jail interview room that Scott thought was bugged. He would not tell me the reasons since he did not

want the DA to know his reasons in advance. Scott still had a few motions pending that had not been ruled on. He never asked me about the procedure or how he needed to present the motion. He did not ask me whether or not he needed to call any witnesses or whether or not he needed to testify. He did not ask any questions about any procedural matters about how these motions were to be heard. He did not know that his venue motion and motion for out of state witnesses require testimony since he never asked. When I got an envelope from Scott, it was obvious that it was filled with the media information, video and affidavits for the venue motion. Scott mailed it to his sister with all the other information in his file. I confronted Scott that he need this information for his hearing and trial. Scott insisted on mailing the information to his sister. I tried to tell him it was a mistake but he just simply would not listen to me on this point.

I also advised Scott that he needed to redo his subpoenas and that he was going to have to justify each person he was trying to subpoena. I do not think that this registered with him but I had done everything I knew to tell him how to subpoena people and what the requirements were in order to be able to subpoena somebody to trial. Scott kept wanting to bring up his "illegal confession" and I had tried to advise him about the danger in admitting a crime when he has a possible appeal point on a confession. At times he seemed to understand the point but he was hell bent on bringing up the fact that his confession was taken illegally. I mentioned that he could get a jury issue on this but I do not believe that he understood me.

I went to see Scott one morning but he was gone. He had been taken to the VA Hospital. When I saw him in the

afternoon, he was handcuffed so obviously he had had some sort of problems at the jail. I had taken Scott information on (1) questionnaires of all jurors, (2) a juror counting sheet to keep track of strikes, (3) an outline of voir dire from the Steiner case, (4) a list of the defense witnesses under subpoena, (5) copies of military records he left in the Courtroom, (6) copies of voir dire information I had prepared which he left in the Courtroom and (7) the Texas Rules of Evidence. Scott was obviously very, very worked up as he had difficulty in maintaining his focus. Every time I tried to talk about voir dire or discuss any of the things that I brought him, he instantly changed the subject until eventually we ran out of time. He told me that he wanted to talk to me again and also indicated that he would "not say anything if I accidentally did more than I was supposed to", indicating that he wanted me to assist him more than what a standby counsel was normally supposed to do. We ended the session without discussing jury selection at all. I was not sure that we were ever going to have an opportunity to have a discussion on jury section [sic] as I could not keep Scott focused.

During one day of questioning jurors, Scott was not keeping up with the strikes. Scott was very tired that day. He said that he stayed up all night. Scott was not paying attention to the questions Bruce asked and responses from the potential jurors. Juror # 21 had problems with insanity. Scott was not paying attention and did not come back to question this juror. When we got to the twelfth juror, Scott had one strike left. The Judge had explained that the left over strikes would not be carried forward on the alternate jurors. Scott never asked me what the legal effect of not using all his strikes would be and did not

consult with me at all on this point. Scott simply took the twelfth juror without asking me a question.

In another jail meeting, Scott insisted on rehashing old stories and exposition of old events that he had told me numerous times. I could not get him to focus on the actual trial of the case other than for brief moments at a time. Scott did not ask any other questions about the trial or any other comments related to the trial. He spent the rest of his time explaining to me again the sequence of events and why he wanted to call certain people to the witness stand. I remember one good meeting with Scott. He was very focused and appeared to be taking his trial very seriously. When I saw him next, we had a very difficult meeting. Scott was upset on the Sheriff's refusal to allow an appointment with a psychiatrist on September 12, 1995. When I asked him to give me a little more information as to why he told me that his mind was too clouded from his illness and he was unable to concentrate. When I asked Scott whether or not he wanted to go ahead and talk about the trial he indicated that he was having too much difficulty staying focused and could not concentrate on anything for any length of time. He said he had even had some questions for me previously but he could not remember what they were.

On occasion, I tried to do more than the limitations of [sic] the Court imposed [sic] standby counsel, but, Scott's mental illness prevented me from helping him in any way. I knew that Scott was unable to ask the proper questions for me to give him advice under the Court's Order so I tried to go above and beyond the Order and suggest that he needed to ask me questions. He still failed to utilize me in any way. Nothing I did could help Scott. He never understood my attempts to help. I tried to do everything.

One time, in the back room, Scott wanted to pray. I was apprehensive about Scott, but, prayed with him holding onto my arm. It made me nervous, but, I wanted to do anything to reassure Scott that attorneys would help him. I know how the Jurors must have felt when he would approach them to hand them back their questionnaires. He had written on each questionnaire but insisted on giving back to each juror after questioning. It was scary when Scott walked up to you. Scott never understood the effect he had on other people. Scott never was able to understand what I was trying to do to help him.

I tried and tried to get Scott to map out his witnesses for his defense so he would plan the order and what he thought they would say. Scott, for some, reason, would not plan witnesses unless forced to by Judge Ables, then he would not call who was on the witness list. Carrie Whitt, with the District Clerk's Office, had made up lists of witnesses to follow in Court. It did no good.

Scott's incompetence affected his case. Bruce Curry, the DA, had put Scott's ex-wife, Sonya Alvarado on the stand on the first day of testimony. She was his first witness. It was her parents that Scott had killed. After Scott's bizarre questions and actions to [sic] Sonya, the Jury was ready to give him the death penalty. Scott angered the Jury by his demeanor and actions. I tried to advise Scott on the method of questioning his ex-wife, but, he did not listen. I told him not to go over the shooting and other details of the family that were not relevant. It did no good to advise Scott.

Scott was repeating questions. He was splitting hairs with the witnesses on the confession. Scott was calling witnesses that had nothing to do with insanity. Scott was

really upset over the release of Dr. Simes. Judge Ables had warned Scott that Dr. Simes would not be available and to call him since he was present. Scott said he did not understand what the Judge had told him and he was confused.

When Scott testified, it looked like he went into a trance. Scott is [sic] sitting in the witness chair with Ranger Cleat Buckelew between him and the Jury. Scott had his head down, not looking at the Jurors although he was seated directly by them. Scott recalled in his trance-like state, the details of the shooting, reciting what happened in the third person as a dialogue. Scott said "Sarge ran into the room. What was Sarge doing? Where is Birdie?". Scott was pointing his hand out across the jury box like he was shooting as he recited "Boom, Boom, Boom", Scott's head was down as he spoke while he pointed at the jury with the booms. He could not see the reaction of the Jury. The Jury was visibly upset by the pointing demonstration. I had seen the jurors who were sitting closest to Scott, move away when he sat down. Now he was blindly pointing at the panel while he spoke of "Sarge shooting Joe and Amanda Alvarado". This was a show of a mentally incompetent man and did more to give him the death penalty than any other event in trial.

This was not a case for the death penalty. Scott's life history and long term mental problems made an excellent case for mitigating evidence. Scott did not present any mitigating evidence because be could not understand the proceeding. He obviously thought that this courtroom "show" would be enough. Although many friends and family were available to testify, Scott only called me at punishment to rebut a statement that Dep. Gideon made about Scott. I tried to make Scott realize what mitigation meant. I do not think that he understood the concept or

how to present evidence or argue for mitigation in his own case. In my opinion, there was much to present, but, he was mentally incapable of showing the evidence,

On many occasions, Scott told the Judge he needed to talk to me about the case. Judge Ables would grant a recess and Scott and I would go to the back courtroom to talk, Scott called it a "Pow-Wow". I knew how long the "Pow-Wow" was going to be by the size and length of the cigar he had to smoke. Scott was allowed to smoke during the recess in the back courtroom. Scott never talked about the case. He talked about something he wanted that was completely irrelevant. At times, Scott would have a basic conversation and other times when it was paranoid delusions. The Court gave Scott breaks every day and I would try to discuss his case to answer his questions or offer help. I was not able to give Scott any assistance because he was not mentally able to focus on his case. We never discussed anything relevant to his case at the breaks.

One day, Scott looked particularly bad. He told me that he could not sleep and had stayed up all night thinking about John Wesley Hardin. He had heard that Hardin was to be reburied. He even told the Judge about the reburial. That day he basically slept in Court. He would have his eyes closed and put his chin down. The Judge would say something when he would put his head down. It would take him a second to say something, like he had been asleep.

Scott dressed in a "Tom Mix" style costume like an old TV western. Scott wore his hat in Court. He had pants that looked like leather suede tucked into his cowboy boots. He wore a cowboy style shirt with a bandana. The shirt was the double fold over type western shirt. One

shirt was a green color, the other was burgundy. Scott wore a big cowboy hat that hung on a string over his back, It was a joke. It was like out of a dime store novel. Scott constantly used an old west vernacular in his speech. He used words like "bronc steer", "run away mule" and "shoe the bosses' hosses".

Prior to the trial, Scott was mailing all of his files to his sister in Chicago or his family in Wisconsin. Scott thought that the Jail guards were going through his files. Scott had received a duplicate of the file from Preston and Richard. I told him that over 75% of the materials had come from the DA and the guards would not go through his legal files. He would not listen. He thought that there was a big conspiracy out to get him. I had to get him the envelopes and get the mail out. My secretary and I sent a lot of mail for Scott. I kept a record of the expenses. Scott wrote all over the envelopes until they were covered with bizarre drawings and religious quotations. Eventually, there was so much going out that the judge told me to not send anymore. Judge Ables asked me why there was so much expense for mail and I told him what I was sending for Scott. When the trial began, Scott did not have his files. The material that had been prepared was not available. Scott's family brought the files back to Texas, but, Scott never used the materials. I do not think that Scott had a rational understanding of the importance of the information. I attach copies of the envelopes that Scott wrote on to the Affidavit.

Scott would call the office frequently wanting me or my secretary to come to see him for some reason. Scott would not say the reason for the visit. If I was able to visit with Scott, he never told why he needed the conference. He would go on about something, but, not his case. If I had

some information or advise [sic] for him, he was unable to respond. If I was gone, Scott would call my Secretary, Dee, so frequently that we would have to put the phone on the answering service.

Scott was filing Motions and Subpoenas with his rambling statements and bizarre artwork. I have copies of the 200 plus subpoenas he filed. Scott wanted to subpoena Jesus Christ, JFK, actors, actresses, and people who had died. I attach copies to this Affidavit. I have copies of the Motions he filed. I attach copies to this Affidavit.

Scott had prepared a special book of his poetry and artwork entitled "Bronco Gental Tamen Poet Ranahans Ranch Savy". The book contains the bizarre artwork and religious symbols that Scott used on other material. I attach a copy of the poetry book I received. Scott wrote on mine "Eloquent? Thou Dark my Path. And Sad My Lot Let me Be still and murmor not But Breath the Pray divinely Taught Thy will Be Done". He had given it to me as a "Fisher of Men" with the Christian symbol of the fish on both sides. This poetry book was very important to Scott. The capital murder trial was not.

After the trial, I spoke with a couple of jurors who told me that Scott probably would not have received the death penalty if the case had been handled differently. I spoke with Debbie Flores and Allen Duncan. In short, the jury was grossly "over-exposed" to Scott. Since Scott presented no real evidence of insanity other than his own behavior, the jury had no trouble with a guilty verdict. Unfortunately, they were also scared to death of Scott and they were fearful that somehow, someway, Scott might get out of prison. They gave him the death penalty to avoid this possibility.

Scott was not able to represent himself due to his mental incompetence. His bizarre actions and words affected witnesses and the Jury. Scott was not able to rationally understand his death penalty trial. I believe that his incompetence brought him the death penalty. In simple terms, by representing himself he hung himself. Scott's incompetence prevented him from asking for or using my assistance as his standby. I was not able to assist Scott in any meaningful way because he was so mentally incompetent. As a result, his trial was truly a judicial farce, and a mockery of self-representation. It should have never been allowed to happen, or, at least, stopped.

The above is true and correct".

/s/ Scott Monroe
SCOTT MONROE

SWORN TO AND SUBSCRIBED before me on this 26th day of July, 1999.

[LOGO]

ELIZABETH
DEBRESE BOHNERT
Notary Public,
State of Texas
My Commission Expires
June 22, 2001

/s/ Elizabeth DeBrese Bohnert
Notary Public
State of _____

My commission expires: _____

INSTRUCTIONS REGARDING STANDBY COUNSEL

1. Unless otherwise requested by the Defendant, standby counsel is to be seen and not heard.

2. Standby counsel is not to sit at the counsel table with Defendant unless Defendant asks him to do so.

3. Standby counsel, when requested by the Defendant, may advise Defendant on *procedural matters only*. Standby counsel shall not, at any time, advise Defendant on any substantive matters, even if requested to do so by the Defendant.

4. Standby counsel may not participate in *any* part of the trial process unless specifically requested to do so by the Defendant, and, then only on procedural matters by way of giving advice to the Defendant.

5. Standby counsel shall not question any prospective jurors nor make any suggestions or offer advice as to which prospective jurors might be favorable to the Defendant or Prosecution.

6. Standby counsel shall not exercise any preemptory challenges or challenges for cause on any prospective jurors.

7. Standby counsel shall not advise Defendant as to any particular areas of inquiry during voir dire.

8. Standby counsel shall not make any objections unless requested to do so by the Defendant.

9. Standby counsel shall not make any motions for mistrial unless requested to do so by the Defendant.

10. Standby counsel shall not advise Defendant of any procedural irregularities, either by the state or by the Defendant, unless requested to do so by the Defendant.

11. Standby counsel shall *not* volunteer any procedural assistance to Defendant.

12. Standby counsel shall not do any other act or take any other action, which in the opinion of either standby counsel or the Defendant, would in any way interfere with or affect the right of the Defendant to represent himself.

REQUEST FOR PROCEDURAL ASSISTANCE FROM STANDBY COUNSEL

I, SCOTT LOUIS PANETTI, do hereby request procedural assistance from my standby counsel, SCOTT F. MONROE, on the matter of or with respect to the following:

_____

_____

_____

Date: _____ /s/ _____
SCOTT LOUIS PANETTI

_____

NO. 72,230

**EX PARTE** **IN THE COURT**

**OF CRIMINAL APPEALS**

**SCOTT LOUIS PANETTI** **OF TEXAS**

**AFFIDAVIT**

Before the undersigned authority, personally appeared Wolfgang Selck, who being duly sworn by me, deposed as follows:

My name is Wolfgang Selck. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am presently retired. I was physician licensed to practice in the State of Minnesota and New Mexico. I graduated from medical school in 1951. I practiced medicine in Minnesota from 1955 to 1958. I worked at a Minnesota State Hospital from 1958 until 1960. I attended the University of New Mexico where I studied Psychiatry. I was on the staff at the Department of Psychiatry at the University for 3 years from 1966 to 1969. I was in private practice in New Mexico for 10 years from 1969 to 1979. I worked at the Starlite Hospital as a psycho-therapist for 12 years from 1981 to 1993.

I treated Scott Panetti at the Starlite Village Hospital for mental illness. I diagnosed Scott as suffering from Schizophrenia, undifferentiated chronic with acute exacerbation and with a borderline personality disorder as a secondary diagnosis in April 1986. In my opinion Scott was mentally ill with a condition of schizophrenia. Scott also suffered from psychotic episodes. Some

of his symptoms of schizophrenia included bizarre behavior, verbigeration which is the repetition of words, fixation on details and hallucinations. A schizophrenic cannot grasp the actual reality and loses the overall picture of the actual reality. Stress can increase the mental illness and cause an inability to function. The use of alcohol and drugs by Scott was in part a form of self medication because he felt the effects of the mental illness. Due to the long term effect of alcohol and drugs Scott most likely developed more and more paranoid ideation and at the time of the trial appeared to be suffering from paranoid schizophrenia When I observed Scott in the hospital in 1986, it was my opinion that he was unable to function in any form or fashion at that point. It was my opinion that Scott was incompetent. Because a person with paranoia is not likely to change, it was my opinion that Scott was in all probability not sane at the time of the offense in 1992 and was definitely not competent to stand trial in 1995, because I observed him for 1 and 1/12 [sic] days. I doubt that he did know right from wrong and most likely could not act any other way he did act due to his illness.

I was never contacted by the attorneys Mr. Preston Douglas nor Mr. Richard Mosty during 1992 until 1995. Since I had treated Scott after a prior psychotic break that required his hospitalization, I had information on his state of mind. I was willing and able to be interviewed and to testify at the competency hearings or the trial. In all probability Scott was severely mentally ill, insane and not competent.

I received a subpoena to appear for the Capital Murder trial in Kerrville, Texas, in September 1995. Scott did not contact me to discuss the

medical records on him, my diagnosis or opinions on him. When I came to Court on the subpoena, I did not know what questions I would be asked or information I would need to know. I told Scott that I did not have the medical records from the hospital and did not remember the specifics of his case. It a had been nine (9) years since I had treated Scott. Scott handed me in the Courtroom a summary of the medical records. Scott did not tell me what he would ask me about. Scott also insisted that I watch the testimony of witnesses. I appeared in Court on Tuesday, September 20, 1995, and sat in the Courtroom all day since Scott insisted that this was important. I was not called to testify until the next day on Wednesday, September 21, 1995. Scott never told me the reason to be present during testimony and I never saw the reason. The request is one of the inappropriate behaviors I witnessed Scott do.

The District Attorney, Bruce Curry, took the time to question me on what opinions I had. I told him that I did not know what Scott would ask me. I told Mr. Curry that I had not examined Scott since 1986 and did not the details of the shooting that lead to the charges. It was obvious to me during the questions that Mr. Curry asked that he had the advantage to cross-examine me since Scott had not told me the subjects of the testimony or what data I needed to know for my opinions. Because Scott was not capable of preparing to defend himself and rationally present my testimony, the District Attorney was given an advantage that he used before the jury.

I had the opportunity to observe Scott for an entire day while he called witnesses. I had the opportunity to see Scott testify to the Jury in a narrative fashion. In my opinion, Scott was not

competent to stand trial because he was unable to assist himself in his own defense and he did not have a factual and rational understanding of the proceeding. I base this opinion on my prior treatment of Scott and on two days of observation of his during the Capital Murder trial. I was able to observe him ask questions of witnesses, give testimony himself, argue with the District attorney and the Judge and see his physical and verbal actions. There is no doubt in my mind that he was mentally ill and that he was incompetent to stand trial.

I witnessed a number of incidents where the inappropriate use of language and actions show that Scott was mentally ill and incompetent. Scott literally enjoyed the spectacle of the Courtroom where he was the center of attention, Scott enjoyed the trial since he was getting attention and was being allowed to act like an attorney, Scott acted like a prima donna. I recognized this behavior as inappropriate since mentally ill persons act out inappropriately. The paranoid person is often acting the role of a prima donna completely ignoring the reality of the situation to make him feel important. The mentally ill and paranoid person feels inferior and will act the role to get attention. Scott wanted to show off and by being allowed to represent himself he had center stage. Scott was acting out a role of an attorney as a facet of the mental illness, not a rational decision to represent himself at trial. One facet of Scott's schizophrenia were the personalities of Ranahan and Sarge Ironhorse. The thought process of the schizophrenic is so frustrated that the person actually thinks someone else does the act they assume multiple personalities. In the Courtroom, Scott was allowed to act

the role of an attorney even though he was not and was not capable of helping himself. The fact that he insisted on defending himself in my opinion, is the best practical demonstration of his mental illness and incompetencies.

Scott was acting as his own attorney from his paranoid fear that the attorneys were out to get him. Due to the paranoia, Scott was lead by his mental illness to demand to represent himself. Since Scott could not trust lawyers to represent him, he had to represent himself. This decision was a facet of his paranoia and severe mental illness.

The testimony of Scott and his jury argument clearly showed to me that he was mentally ill. It was so obvious to me because the inappropriate behavior is a clear sign of mental illness. Scott was inappropriate in his testimony and argument because he was not relevant and did not prove any relevant point. Scott gave a rambling presentation that showed he could not think clearly nor understand what information was important in his trial The rambling nature of his talk shows a break down in his thought processes. Verbal rambling is a sign of mental illness.

As a psychiatrist I also observe the emotion rather than the contents of the sentence. The emotion that Scott displayed was also a clear sign of mental illness and incompetence. To the lay person and the jury, it may have appeared that Scott was capable because he appeared normal in the sense that he could talk in sentences ask questions and argue. One reason that some mental illness is difficult to determine is because paranoid people are unusually sharp in certain areas. A paranoid schizophrenic may be

alert to time and place, but, this has to be contrasted with the verbal rambling where the person is lost in irrelevant talk or where the person has fixed ideas. In my opinion Scott was so inappropriate that the only conclusion is mental illness and incompetence.

There were other incidents of inappropriate behavior that indicate incompetence. Scott was very loud in his talk and walked around the Courtroom in an inappropriate manner. It is not my opinion that Scott posed a physical danger, but, his words and acts were out of place and inappropriate. There were a number of times where Scott was acting as the prima donna and the judge tried to stop him. Scott would argue with the Judge and the Jury would be excused. After the Jury's return, Scott continued his irrelevant and inappropriate rambling. A particular problem for mentally ill people is the repetition of words. The phenomena is called verbigeration and shows an inability to function. Scott would repeat certain words that had no relevance.

In my opinion Scott's mental illness had an effect on the Jury that was visible. It was obvious from the appearance of the Jury that Scott antagonized them by his verbal rambling and antics. Scott was completely unaware of the effect of his words and actions. I observed in the Jury a complete negative reaction to Scott. Members of the Jury had hostile stares and looked at Scott in disbelief while he rambled and made no sense. The Jury seemed to see Scott as putting on a show. Scott was unable to see the totally negative impact of his mental illness on the Jury. I saw Scott's rambling and antics as a sign of his clear incompetence. I suspect that the members of the

Jury as lay persons saw Scott and thought he was normal and pretending to be mentally ill. In my opinion it is not possible to imitate the words and actions of a mentally ill person. To an experts there are too many details of voice and action that indicate the signs of mental illness: the inappropriate behavior, the repetition of words, the fixation on details, the bizarre presentation. He should be institutionalized in a State Hospital for the criminally insane. In my opinion, Scott is not a malingerer. Scott was not faking a mental illness. Scott was severely mentally ill and has not changed and most likely shall not improve to an appreciable degree. When I was treating Scott in 1986 he was not facing any charges and had no reason to act mentally ill. He was hospitalized several times in 1986 because he had complete breaks from reality and was suffering severe mental illness. When I observed Scott in 1995 it was obvious that his mental illness was preventing him from representing himself and adversely affecting the Jury deciding his case.

The trial gave Scott the opportunity to get the attention that a paranoid person so desperately needs. Scott needed to represent himself out of the delusion that he alone could defend himself. Scott wanted recognition as an attorney and got the Judge to allow him center stage. In Court, Scott did not perform as an attorney should before the Jury. Scott could not perform properly because of the mental illness. The mental illness caused Scott to fail to recognize the importance of the Jury. In his mind the Jury was not important. What was important to Scott was the recognition of the Judge, the District Attorney, witnesses and the public that Scott was an

attorney in the Courtroom. By being his own attorney he would be allowed to speak directly with witnesses, the Judge and the District Attorney. By being his own attorney, he would be allowed to be as important as the attorneys in the Courtroom, the Judge and the District Attorney. It was more important to Scott to act like he was an equal regardless of the consequences of his actions. Scott failed to understand that the Jury was deciding his fate and that his words and actions would affect their verdict. Scott was completely satisfied that he was the center of attention of the Judge, the District Attorney and the witnesses and public in the Courtroom. What Scott completely failed to understand was that he needed an attorney to perform the role of his advocate for his case. What Scott wanted was to take over the Courtroom and do what he pleased and say what he wanted. The Jury was irrelevant to Scott. The Jury's decision was irrelevant to Scott. The argument he made that the Judge may have helped to receive the guilty verdict by the jury by allowing him to say and act as he wanted in Court.

The Courtroom was full of witnesses. When a witness was called he or she would get up from the public seats in the Courtroom and go to the witness stand. The witnesses who were called to testify had heard the prior testimony. I sat in the Courtroom for a full day and about a half day. The Courtroom was also full of law enforcement. I do not remember the exact number of personnel, but, I do recall that there were a number of deputies. I also recall that there were men on both sides of Scott at all times. There were other uniformed deputies in the area within the bar in the Courtroom. There were also uniformed

deputies located throughout the entire Courtroom. The law enforcement personnel could be seen using sign language to communicate with each other during the trial. I did not see any reason for additional security since Scott was mentally ill. I did not see any behavior that indicated that Scott was going to physically act out or be violent. I did see and hear Scott get loud and belligerent, but, this is typical inappropriate behavior for an incompetent person.

I was called as a witness by Scott at his Capital Murder trial in Kerrville, Texas. I was able to observe Scott in Court since the witnesses were allowed to sit in the Courtroom prior to their testimony. I was able to observe Scott while he questioned witnesses and myself and the content of his questions. I was able to observe Scott while he talked to the Judge or the District Attorney. In my opinion Scott was not competent at his trial. There is no question in my mind that Scott was incompetent at his trial. I base my opinion on my prior observations of Scott and what I saw in the Courtroom. Scott's questions and conduct were bizarre and reflected a break from reality.

/s/ Wolfgang Selck
WOLFGANG SELCK

SWORN TO AND SUBSCRIBED before me on this the 9th day of June, 1997.

/s/ Chris Wallendorf
Notary Public
State of Texas
My Commission Expires: 10/22/2000

**CAUSE NO. 6008**

| | | |
|---|---|---|
| **IN THE MATTER OF THE MARRIAGE OF** | § | **IN THE DISTRICT COURT** |
| **JANE IRENE PANETTI AND SCOTT LOUIS PANETTI** | § | **216TH JUDICIAL DISTRICT** |
| **AND IN THE INTEREST OF CHASE LOUIS PANETTI, KATRINA JANE PANETTI and MARY ROSE PANETTI, Children** | § | **GILLESPIE COUNTY, TEXAS** |

**PETITIONER'S SUPPORTING AFFIDAVIT FOR EXTRAORDINARY RELIEF**

**THE STATE OF TEXAS** §

**COUNTY OF GILLESPIE** §

BEFORE ME, the undersigned authority, on this day personally appeared JANE IRENE PANETTI, who, being by me duly sworn on oath stated:

> "My name is JANE IRENE PANETTI. I am the Petitioner in the above styled and numbered cause. I am of sound mind and am capable of making this Affidavit. I have personal knowledge of the facts stated herein."
>
> "My husband, SCOTT LOUIS PANETTI, has over the last two months been experiencing hallucinations and has been generally out of touch with reality. He became very paranoid and was always thinking that someone was watching him from the creek in our backyard. He would sit on the porch all day to keep watch. The paranoia has continued to present. After our baby was

born in March, he became obsessed with the idea that the devil was in our house. He finally had a ceremony to get rid of the devil during what he called the 'devil's birthday'. He buried many valuables next to the house and stacked other furnishings and valuables above the ground which he washed with water. He would stay up during the night and 'make magic with the lights'. He claims that he saw the devil on a wall and cut the devil with a knife and that blood had run out on him."

"On another occasion he called up Wilbert-Hopf Vault Company where he once worked and accused them of having an employee who had torn up the road in front of our house. That had not happened, he was just imagining it. He argued with his ex-employer and told him to come over and have it out with guns and knives."

"Over the past two months he has been in and out of the State Hospital in Kerrville, Outreach Center and Starlight at Centerpoint. When he was at Centerpoint, he kept leaving on his own. On one occasion when he came home and when he knew I would not be pleased with his leaving Starlight, he put on a camouflaged jacket and stood outside and told me that if I really wanted to know what Apocalypse Now was really like to just try something."

"This past week, it was recommended that he be transferred to the V.A. Medical Center in Waco, Texas, and I arranged for the Kerr County Emergency Medical Service to take care of the travel arrangements as I feared he might try something if I attempted to transport him. Attached hereto is a copy of the health insurance claim form that was given me by the Emergency

Medical Service. My husband's diagnosis is described as 'chronic undifferentiated schizophrenic'. In the past he has phsyically struck me and caused bodily harm to me."

"My husband called me last night and told me that he was fine and was going to leave the hospital. I encouraged him to stay because he needs help. In his paranoid state, I am sure that he now sees me as a threat and fear that he may harm me, the children, or try to destroy our property."

Signed this 16th day of May, 1986.

/s/ Jane Irene Panetti
JANE IRENE PANETTI,
Petitioner

SWORN TO AND ACKNOWLEDGED BEFORE ME this 16th day of May, 1986, by JANE IRENE PANETTI.

/s/ LaVerne Houy
Notary Public,
State of Texas
My Commission Expires:
5/23/88
LaVerne Houy
(Typed or Printed Name)

## AFFIDAVIT

**STATE OF TEXAS** §
§
**COUNTY OF BEXAR** §

Before me, the undersigned authority, on this day personally appeared John Wilson Rowland, known to me to be the person whose name is subscribed below, who being duly sworn by me, deposed as follows:

"My name is John Wilson Rowland. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

I have been engaged in the practice of law for sixteen (16) years in the State of Texas since November 4, 1983. Currently, I am also licensed to practice law in the Western District of Texas, the Fifth Circuit Court of Appeals in New Orleans, Louisiana, and the Supreme Court of the United States of America. I am Board Certified in Criminal Law by the Texas Board of Legal Specialization. My Law Office is located at 131 Idlewilde, Comfort, Texas 78013. My telephone number is (830) 995-4371.

I represented Scott Louis Panetti in the state habeas proceedings. I have meet [sic] with Mr. Panetti on numerous occasions during the three (3) years since my appointment in 1996. In my opinion, Mr. Panetti is not competent because he does not have a factual or rational understanding of the proceedings. Mr. Panetti suffers from severe mental illness, Schizoaffective Disorder, which prevents him from rationally understanding and communicating about his case. Schizoaffective Disorder is a combination of schizophrenia and manic depression, a bipolar condition. Mr. Panetti is unable to have a rational

conversation because he has loose associations in his thought process, that is his communication is not coherently connected together. He has flights of ideas where he suddenly changes his thought process and goes off on incoherent or illogical ideas. Mr. Panetti suffers from delusions, hallucinations and recounts bizarre stories which show that he does not have a factual understanding of his circumstances. Due to his severe mental illness he was not able to assist this counsel during the state habeas proceedings.

I recently met with Mr. Panetti on June 7, 1999, with co-counsel, Michael C. Gross. Mr. Panetti continues to be incompetent. I attempted to explain that Mr. Gross and I had been appointed in his federal habeas corpus case, but, he was unable to respond to what I said. Instead, Mr. Panetti spoke at length about irrelevant subjects (looseness of associations); including his spiritual healing powers, his desire to reconsecrate his Nazerine vows, and his grandiose self concept as a Messiah. Mr. Panetti's speech was rapid, non-sequential, irrelevant and irrational (flight of ideas). Mr. Panetti continues to have hallucinations and suffer from delusions; he described the torture chamber used at Death Row which he claims is below the prison and referred to a torture chamber at Jester IV, a psychiatric unit where he has been examined by TDCJ staff. He is very egocentric, with grandiose delusions, talking at length about his healing powers and role as a Messiah. Mr. Panetti's appearance was not appropriate; his eye contact was often an intense stare, he laughed at jokes only he understood and he often had a smile that was not appropriate to the conversation. He also suffered from perceptual disturbances which he called the "voice of the spirit."

I had prepared an outline of topics to discuss with Mr. Panetti. Mr. Panetti was unable to respond to a single topic. This inability to rationally discuss his case, caused by his thought disorder, is consistent with all my prior visits with him. When I attempted to mention a topic, he was unable to continue the same line of thought in his conversation, instead going off on some bizarre tangent. He would talk about the Death Row guards and the "belly of the whale" or his spiritual healing and role as God's son. During the entire conversation, Mr. Panetti constantly held up for our inspection a small pocket bible. The cover of his copy was filed [sic] with scribbles and art. Mr. Panetti was often making esoteric references to the Bible and would hold up his copy to show us some important significance that only he saw. To answer a question from counsel, he would open his Bible to read a verse that signified to him the answer. Among his many bizarre statements, Mr. Panetti said that he alone at Death Row was a "closet commando Guru" and that "he who is first is last." It was impossible to have a rational conversation with Mr. Panetti about his case.

When I told Mr. Panetti the interview was finished, he stated that he was ready to respond to our questions. I had gone over the list of topics and was unable to get a single specific rational response. At the conclusion of the interview, Mr. Panetti was unaware of his situation and did not appreciate that he was not able to rationally respond about his case. My last remarks were about the next steps in the case. Mr. Panetti last response was typically irrelevant and irrational. Mr. Panetti finished the interview telling us that "Jesus is here" and the "Lord knew everything today."

I continue with the opinion that Mr. Panetti is not competent. It is my opinion that he does not have a factual understanding, nor a rational understanding of the proceedings against him. Mr. Panetti's thought disorder prevents him from assisting his counsel in his defense.

I have prepared and read this statement it is true and correct.

/s/ John Wilson Rowland
**JOHN WILSON ROWLAND**

SWORN TO AND SUBSCRIBED before me on this the 23 day of June, 1999.

[LOGO] LORI FLORES MY COMMISSION EXPIRES September 16, 2002

/s/ Lori Flores
Notary Public
State of Texas

**CAUSE NO. 3310**

| | | |
|---|---|---|
| **THE STATE OF TEXAS** | § | **IN THE DISTRICT** |
| | § | **COURT OF GILLESPIE** |
| **V.** | § | **COUNTY, TEXAS** |
| **SCOTT LOUIS PANETTI** | § | |
| | § | **216TH JUDICIAL DISTRICT** |

**DEFENDANTS MOTION FOR APPOINTMENT OF COUNSEL TO ASSIST HIM IN ARTICLE 46.05 PROCEEDINGS**

(Filed February 19, 2004)

Defendant Scott Louis Panetti asks this Court to appoint and reasonably compensate undersigned counsel to assist him in the proceedings to determine whether he is competent to be executed. *Ford v. Wainwright,* 477 U.S. 399 (1986), relying on the Eighth and Fourteenth Amendments, assumes that an inmate who makes a substantial threshold showing of incompetence will be represented by counsel during the competency determination proceedings. Mr. Panetti clearly made such a threshold showing in his last Article 46.05 motion. Accordingly, this Court must appoint counsel to represent him for the remainder of the *Ford* proceedings.

Although the Texas Legislature codified the process for determining whether a death row inmate is competent to be executed, critical issues remain unresolved regarding the procedures to ensure protection of an inmate's Eighth and Fourteenth Amendment rights. *Ex parte Caldwell,* 58 S.W3d 127 (Tex. Crim. App. 2000), the only case from the Court of Criminal Appeals reviewing Article 46.05, makes it clear that the trial court has the discretion to appoint counsel "in any given case." *Id.* at 130. *Caldwell* specifically

addressed whether the statute required the appointment of counsel to ***prepare*** the motion and assist the inmate in meeting the incompetency threshold. The Court of Criminal Appeals held that: "There is no provision in article 46.04[1] for the appointment of counsel for ***preparation*** of a motion to determine competency. Although a trial court could appoint counsel in any given case, the trial court does not abuse its discretion by failing to do so in this context." *Id.* at 130 (emphasis added).

Unlike Jeffrey Caldwell, Mr. Panetti is not seeking appointment of counsel to assist him in preparing a competency motion. Undersigned counsel already performed that service pro bono. Although Article 46.05 does not expressly provide for the appointment of counsel for those inmates, like Mr. Panetti, who have made "a substantial showing of incompetency," *Caldwell* implies that failure to do so would be an abuse of the trial court's discretion. *Id.* at 130.[2] More important, however, failure to appoint counsel after the inmate has made a substantial threshold showing of incompetency would violate the minimum due process requirements set out in *Ford*. Where constitutionally required procedures are not forbidden by statute – but are also not expressly permitted – the courts must temporarily provide a remedy until the

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[1] Article 46.04 was renumbered Article 46.05 in the Texas Code of Criminal Procedure, effective September 1, 2001. Acts 2001, 77th Leg., ch. 1420, §1.001(13).

[2] According to the ABA, "the prospect of an incompetent defendant litigating his or her own competence pro se does not afford sufficient assurance of a fair adjudication." ABA Criminal Justice Mental Health Standards §7-5.7 comment at 298 (1989). "[T]he risk of erroneous determination when the inmate is not represented is very high, and the likelihood that counsel will reduce the risk of error is substantial." *Id.*

legislature establishes a constitutionally sufficient procedure. *See, e.g., Id.* at 131 (Johnson, J., dissenting) ("The absence of a provision in article 46.04 which explicitly deals with the appointment of counsel should not be read as negation of the constitutional right to counsel at critical stages of a criminal prosecution. Silence is not negation.").

Although *Ford v. Wainwright,* 477 U.S. 399 (1986), is more commonly cited for the proposition that the Eighth Amendment prohibits the execution of the insane, seven Justices of the Court also expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. Although the seven Justices, in three separate opinions, could not agree on the minimum level of procedural due process required by the Constitution, all seven assumed that the death row inmate would have the assistance of counsel during the competency determination. *See Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) (noting that "any procedure that precludes the prisoner ***or his counsel*** from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate") (emphasis added); *id.* at 427 (Powell, J., concurring in part and concurring in the judgment)) ("The State should provide an impartial officer or board ***that can receive evidence and argument from the prisoner's counsel,*** including expert psychiatric evidence that may differ from the State's own psychiatric examination.") (emphasis added); *id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.) (finding Florida's competency procedures inadequate because "***counsel for the inmate***" was not permitted to participate in the examination of the medical experts in

any adversarial manner) (emphasis added). Clearly, *Ford* demands, through the Eighth and Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetency be assisted by counsel throughout the remainder of the competency proceedings.

## CONCLUSION

Pro bono counsel made a substantial threshold showing of Mr. Panetti's incompetency in the Article 46.05 motion filed on February 4, 2004. Once this threshold has been met, *Ford,* in conjunction with the Eighth and Fourteenth Amendments, requires the appointment of counsel for the competency determination. Nothing in Article 46.05 or *Caldwell* prohibits appointment of counsel at this stage of the proceedings. Accordingly, this Court should now appoint undersigned counsel and reasonably compensate him nunc pro tunc to February 4, 2004.

Respectfully submitted,

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Attorney for the Defendant,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

**CAUSE NO. 3310**

| | | |
|---|---|---|
| **THE STATE OF TEXAS** | § | **IN THE DISTRICT** |
| | § | **COURT OF GILLESPIE** |
| **V.** | § | **COUNTY, TEXAS** |
| **SCOTT LOUIS PANETTI** | § | **216TH JUDICIAL** |
| | § | **DISTRICT** |
| | § | |

**MOTION TO ENSURE THAT THE ARTICLE 46.05 "FINAL COMPETENCY HEARING" COMPORTS WITH THE PROCEDURAL DUE PROCESS REQUIREMENTS OF FORD**

(Filed February 19, 2004)

Counsel for Defendant Scott Louis Panetti asks this Court to ensure that the Article 46.05 "final competency hearing" comports with *Ford v. Wainwright*, 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. Although Justice Powell recognized in *Ford* that death-sentenced inmates do not enjoy the full panoply of trial rights in proceedings to determine their competency to be executed, a majority of the *Ford* Court did conclude that the hearing must retain some adversarial aspects, including the right to participate through appointed counsel, the right to present expert opinion differing from those offered by State or court-appointed experts, the right to explain the inadequacies of other competency evaluations, the right to discover the bases of any unfavorable expert reports, and the right to present argument. Accordingly, the "final competency hearing" required by Article 46.05 (k) must encompass these basic due process requirements.

The plain language of Article 46.05 requires the trial court to hold a "final competency hearing" before it makes its determination of the inmate's competency to be executed.

*See* TEX. CODE. CRIM. PROC. art. 46.05(k) ("If, on the basis of any reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, ***and any evidence introduced in the final competency hearing***, . . . . ") (emphasis added). This "final competency hearing" must meet the due process guarantees enumerated in *Ford*. Seven Justices in *Ford* expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law directed the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. *Id.* at 412. After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. *Id.* If the Governor concluded that the inmate was competent, he issued a death warrant. *Id.* at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. *Id.*

Although the seven Justices, in three separate opinions, could not agree on the minimum level of process required by the Constitution, all were troubled by the procedural inadequacies of Florida's competency determination. Justice Marshall, joined by three other members of the Court, found the Florida procedure constitutionally inadequate, because it precluded the condemned inmate or his counsel from presenting relevant information to the factfinder or participating in the competency determination in any adversarial manner. *Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) Recognizing that the probability of making a reliable decision increases when the factfinder can consider differing

psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the fact-finder loses the substantial benefit of potentially probative information." *Id.*

Justice Marshall noted that a related defect in the Florida procedure stemmed from the prisoner's inability to challenge, clarify, or impeach the findings of the state-appointed psychiatrists through cross examination or a less formal method. *Id.* at 415. He emphasized the important role that questioning the experts serves, because it:

> would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts, concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent.

*Id.* (citation omitted). In sum, Justice Marshall, along with three other members of the Court, concluded that the "adversary presentation of relevant information must be as unrestricted as possible." *Id.*

In a separate concurring opinion, Justice Powell noted that the Florida procedures for determining competency did not comport with the fundamental fairness that is "the

hallmark of the procedural protections afforded by the Due Process Clause." *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Focusing on the fundamental requisite of due process – the opportunity to be heard – Justice Powell concluded that the Florida procedures did not afford the petitioner that opportunity. *Id.* Because the Florida statute did not require the Governor to review materials that the prisoner submitted, Justice Powell concluded that:

> [T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

*Id.* Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id.* at 427.

Finally, Justice O'Connor also recognized that the Florida procedures for determining competency were constitutionally inadequate. Like Justice Powell, Justice O'Connor believed that Florida's failure to permit counsel for the inmate to participate in the competency determination and the Governor's exclusion of all advocacy from the parties involved violated the bedrock due process principle

of the opportunity to be heard. *Id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.).

Accordingly, this Court should find that the "final competency hearing" required by Article 4605(k) must include the right to participate through appointed counsel, the right to question and cross-examine witnesses, the right to present expert opinion differing from those offered by State or court-appointed experts, the right to explain the inadequacies of other competency evaluations, the right to discover the bases of any unfavorable expert reports, and the right to make argument.

A proposed order is attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

/s/ Michael C. Gross

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Attorney for the Defendant,
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**CAUSE NO. 3310**

| | | |
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| **THE STATE OF TEXAS** | § | **IN THE DISTRICT COURT OF** |
| **V.** | § | |
| **SCOTT LOUIS PANETTI** | § | **GILLESPIE COUNTY, TEXAS** |
| | § | **216TH JUDICIAL DISTRICT** |

**EX PARTE MOTION FOR PREPAYMENT OF FUNDS TO HIRE MENTAL HEALTH EXPERT TO ASSIST DEFENSE IN ARTICLE 46.05 PROCEEDINGS**

(Filed Feb. 19, 2004)

Counsel for Defendant Scott Louis Panetti asks this Court to provide funds so that he can retain the services of a mental health expert to assist him in the Article 46.05 competency proceedings. Under *Ford v. Wainwright*, 477 U.S. 399 (1986), along with the Eighth and Fourteenth Amendments, an indigent death row inmate who has made a threshold showing of incompetence is entitled to funds to hire a mental health expert to assist counsel in reviewing the evaluations of court-appointed or State's experts, preparing for the competency proceedings, and presenting and questioning witnesses at a competency hearing. Mr. Panetti clearly made the requisite threshold showing in his last Article 46.05 motion. Accordingly, this Court must provide funds for counsel to obtain the assistance of a defense team mental health expert.

The Texas Legislature codified the process for determining whether a death row inmate is competent to be executed. Article 46.05(f) sets out the procedures where the court "shall order at least two mental health experts to

examine the defendant." However, these court-appointed experts are distinct from the defense team consulting expert counsel for Mr. Panetti seeks. The statute is silent on the critical issue of the prepayment of funds to enable counsel to retain a defense team expert to assist in the competency proceedings. Where constitutionally required procedures are not forbidden by statute – but are also not expressly permitted – the courts must temporarily provide a remedy until the legislature establishes a constitutionally sufficient procedure. Proceedings to determine Mr. Panetti's competency for execution must comport with the minimum due process guarantees enumerated in *Ford*. Once an inmate has made a threshold showing of incompetence, failure to approve the payment of funds for counsel to obtain the services of a defense team mental health expert would violate the minimum due process requirements set out in *Ford*.

Seven Justices in Ford expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law directed the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. *Id.* at 412. After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. *Id.* If the Governor concluded that the inmate was competent, he issued a death warrant. *Id.* at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. *Id.*

Although the Court could not agree on the minimum level of process required by the Constitution, five Justices

took for granted that the prisoner would have the assistance of a consulting mental health expert. Justice Marshall, joined by three other members of the Court, assumed that the condemned inmate would have the opportunity to present evidence from his own mental health expert during the competency proceedings. Recognizing that the probability of making a reliable decision increases when the factfinder can consider differing psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – ***especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission*** – the factfinder loses the substantial benefit of potentially probative information." *Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) (emphasis added).

In a separate concurring opinion, Justice Powell, like Justice Marshall, assumed that the death-sentenced inmate would have the assistance of a mental health expert separate from any State's experts or court-appointed experts:

> ***[The determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.*** Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

*Id.* at 424 (Powell, J., concurring impart and concurring in the judgment) (emphasis added). Although Justice Powell refused to define the exact procedural protections that the

Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement that included the need for a defense mental health expert: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, ***including expert psychiatric evidence that may differ from the State's own psychiatric examination***." *Id.* at 427 (emphasis added).

Clearly, *Ford* demands, through the Eighth and Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination.

## CONCLUSION

Counsel made a substantial threshold showing of Mr. Panetti's incompetency in the Article 46.05 motion filed on February 4, 2004. Once this threshold has been met, *Ford* requires the court to provide funds for counsel to hire a consulting mental health expert to assist in the competency determination. Nothing in Article 46.05 prohibits the disbursement of such funds. In fact, the Eighth and Fourteenth Amendments demand it for an indigent death row inmate like Mr. Panetti. Accordingly, this Court should provide undersigned counsel with reasonably necessary funds so that he may retain Michael R Arambula, M.D., R.Ph., to assist him in these competency proceedings.

Respectfully submitted,

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Attorney for the Defendant,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

**CAUSE NO. 3310**

| | | |
|---|---|---|
| **THE STATE OF TEXAS** | )( | **IN THE DISTRICT** |
| | )( | **COURT OF** |
| | )( | |
| **V.** | )( | **GILLESPIE COUNTY,** |
| | )( | **TEXAS** |
| | )( | |
| | )( | **216TH JUDICIAL** |
| **SCOTT LOUIS PANETTI** | )( | **DISTRICT** |

**ORDER**

(Filed Feb. 26, 2004)

Based on new Affidavits presented by Defense Counsel concerning the Defendant's present competency to be executed and in accordance with the Federal Court Order issued in this cause on February 4, 2004.

IT IS HEREBY ORDERED that Mr. Panetti's Renewed Motion to Determine Competency to be Executed is GRANTED. Mr. Panetti's execution scheduled for February 5, 2004, is STAYED pursuant to Judge Spark's Order. Pursuant to Art. 46.05(f) of the Code of Criminal Procedure, the following two mental health experts are appointed to examine the defendant to determine whether the defendant is incompetent to be executed:

Dr. Mary Anderson
Board Certified Psychiatrist
Austin, Texas
512/773-7741

and

Dr. George Parker
PHD Clinical Psychologist
Austin, Texas
512/458-8020

The standards for incompetency to be executed are those standards described by subsection (h) of Art. 46.05 of the Code of Criminal Procedure.

SIGNED this 20 day of February, 2004.

/s/ Stephen B. Ables
JUDGE PRESIDING

**CAUSE NO. 3310**

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|---|---|---|
| **THE STATE OF TEXAS** | § | **IN THE DISTRICT** |
| | § | **COURT OF GILLESPIE** |
| **V.** | § | **COUNTY, TEXAS** |
| **SCOTT LOUIS PANETTI** | § | |
| | § | **216TH JUDICIAL DISTRICT** |

**DEFENDANT'S MOTION TO RECONSIDER**

(Filed March 4, 2004)

On February 25, 2004, this Court ruled that it would wait until the court-appointed mental health experts have completed their execution competency examinations of Defendant Scott Panetti to decide the majority of the motions defense counsel filed in an attempt to ensure a reliable and fair competency determination under *Ford v. Wainwright,* 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. If this Court waits until after the expert examinations take place before ruling on the motions, its inaction will render a number of the motions moot. In effect, by delaying its ruling, the Court has already impliedly denied several of the motions. Accordingly, counsel for Mr. Panetti asks the Court to reconsider its decision on these motions.

On February 6, 2004, this Court ordered the parties to participate via telephone in a status conference in Mr. Panetti's case on February 9, 2004. On February 9, 2004, the Court ordered the Gillespie County District Attorney E. Bruce Curry and undersigned counsel Michael Gross to each provide it with the names of mental health experts that it should consider appointing under Article 46.05(f). The Court allowed the parties until February 20, 2004, to provide the experts' names. The Court also permitted the

parties to file, by February 20, 2004, any motions concerning the competency procedures under Article 46.05. The Court indicated that it would hold another telephonic status conference on that same date.

On February 19, 2004, counsel for Mr. Panetti filed ten motions related to the competency-to-be-executed proceedings under Article 46.05: (1) Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings; (2) Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings; (3) Ex Parte Motion for Prepayment of Funds to Hire Investigator to Assist Defense Counsel; (4) Motion for Member of Defense Team to Be Present During Expert Evaluations of Scott Panetti; (5) Defendant's Motion for Discovery; (6) Motion Asking Court to Refrain from Setting New Execution Date; (7) Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts; (8) Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti; (9) Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of *Ford*; and (10) Motion to Transcribe All Proceedings Related to the Competency Determination under Article 46.05.

The next day, February 20, 2004, counsel for Mr. Panetti provided, via fax, the Court and the District Attorney with the name of Dr. Randy Price, as a mental health expert the Court should appoint under Article 46.05(f). However, no status conference took place that day, as undersigned counsel believed there would. Undersigned counsel eventually contacted Judge Ables's court coordinator and was informed that the judge was out of

the office for the day. Counsel then contacted Mr. Curry. Mr. Curry informed counsel for Mr. Panetti that the Court had called him earlier in the week to let him know that it would appoint the mental health experts without input from the parties. Consequently, the Court canceled the status conference set for February 20, 2004. Counsel for Mr. Panetti was never informed of this development.

On Monday, February 23, 2004, counsel for Mr. Panetti received an order from the Court signed on February 20, 2004. In the order, the Court appointed two mental health experts, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, to exam Scott Panetti for his competency to be executed.

On February 25, 2004, at an informal, unrecorded status conference, the Court informed the parties that it would not rule on the defense motions until after the court-appointed experts had completed their competency evaluations. The Court stated that it would re-visit the motions if both court-appointed experts concluded that Mr. Panetti is competent to be executed.

A number of the motions counsel for Mr. Panetti filed on February 19, 2004, will be rendered moot if the Court waits to rule on them until after the court-appointed experts' examinations take place. In effect, the Court has impliedly denied these motions. The Court expressly denied the Motion to Videotape All Competency Examinations. The Court also denied the Motion for Discovery, stating that it would authorize the discovery of Mr. Panetti's records only if the State agreed. Accordingly, counsel for Mr. Panetti asks the Court to reconsider its rulings on the following motions: (1) Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05

Proceedings; (2) Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti; (3) Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings; (4) Ex Parte Motion for Prepayment of Funds to Hire Investigator to Assist Defense Counsel; (5) Motion for Member of Defense Team to Be Present During Expert Evaluations of Scott Panetti; (6) Defendant's Motion for Discovery; (7) Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts; (8) Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of *Ford*; and (9) Motion to Transcribe All Proceedings Related to the Competency Determination under Article 46.05.

**1. Motion for Appointment of Counsel**

The Court's continued failure to rule immediately on the Motion for Appointment of Counsel to Assist Mr. Panetti in the Article 46.05 Competency Proceedings fatally undermines Mr. Panetti's Eighth and Fourteenth Amendment rights under *Ford* for a fair, full, and reliable determination of his competency to be executed. This failure to appoint and compensate counsel is especially egregious now that the court-appointed experts are on the verge of conducting their examinations of Mr. Panetti. Undersigned counsel is representing Mr. Panetti pro bono, but he cannot continue to provide the State of Texas with his services free-of-charge. Counsel has prepared pro bono two Article 46.05 motions, ten motions related to the current competency proceedings, and this motion to reconsider. He has paid out-of-pocket costs to fly to Houston, rent a car, and interview Mr. Panetti in preparation

for filing the second Article 46.05 motion. In addition, he persuaded Dr. Mark Cunningham to conduct a preliminary examination of Mr. Panetti free-of-charge. Counsel is, in effect, subsidizing the State of Texas for the execution of his own client. All the other participants in this matter continue to be paid for their involvement in these proceedings. The Court's failure to officially appoint and reasonably compensate undersigned counsel – especially now that two experts have been appointed to exam [sic] Mr. Panetti – is in clear violation of *Ford*.

**2. Motion to Set Out Protocol for Conducting Competency Evaluations**

Without requiring the court-appointed mental health experts to abide by procedures that meet professional standards for conducting execution competency examinations, the Court cannot be confident that the experts' conclusions will withstand serious scrutiny. Only by identifying the accepted standards for carrying out these examinations ***before*** the experts begin their work can this Court ensure that the assessment techniques used by the court-appointed experts will meet the hallmarks of accuracy and trustworthiness necessary to satisfy *Ford*.

**3. Motion for Funds to Hire Defense Team Mental Health Expert**

In the absence of assistance from his own mental health expert to witness the examinations and review the work performed by the court-appointed experts, counsel will be unable to challenge the experts' conclusions to ensure that they are reliable. Counsel needs a defense

team expert immediately, before the court-appointed experts begin their examinations.

**4. Motion for Funds to Hire Investigator**

An objective and reliable assessment of competency that comports with professional standards of practice requires the collection of extensive records, in addition to interviewing collateral witnesses such as prior health care providers, family members, friends, fellow inmates, correctional officers, and spiritual advisors who have had contact with the inmate over the past few years. Counsel for Mr. Panetti needs the assistance of an investigator immediately, to obtain the documentation and conduct the interviews of collateral contacts. Without this critical information, the court-appointed mental health experts will be unable to make a reliable determination of competency.

**5. Motion for Member of Defense Team to Be Present During Evaluations**

The presence of counsel or some other member of the defense team during the experts' evaluations is required so that the defense can assess the nature and reliability of the evaluations and, if appropriate, offer expert rebuttal evidence to them. Obviously, delaying a ruling on this motion until after the expert examinations have taken place will render it moot and impliedly denied.

**6. Motion for Discovery**

To conduct competency examinations that meet professional standards, the court-appointed experts will

need to review documents that are in the exclusive possession of state agencies, like county jail records and TDCJ medical files. Court-ordered discovery will ensure that the experts are provided with the complete records of Mr. Panetti. The experts must review these records before they can make a reliable determination of competency.

**7. Motion to Videotape All Competency Examinations**

Videotaping will enable counsel's mental health expert to independently assess the adequacy of the examinations performed by the court-appointed experts. Moreover, videotaping will allow the Court to review firsthand compelling evidence of Mr. Panetti's current mental condition, subject the evidence to serious scrutiny, and reduce the possibility of making an unreliable competency determination. Finally, videotaping will permit counsel to preserve evidence for federal review should this Court find Mr. Panetti competent. The Court's express denial of this motion is especially problematic in light of its implicit denial of counsel's request for a member of the defense team to be present during the experts' examinations.

**8. Motion to Ensure Due Process at Competency Hearing**

By refusing to allow the prepayment of funds for counsel to hire his own mental health expert, refusing to permit a defense team member to be present during the court-appointed experts' examinations, and refusing to allow videotaping of the experts' examinations, this Court will render the final competency hearing unfair. Without the assistance of a defense team expert, especially one who was present during the court-appointed experts' examinations – or

who at least had the opportunity to review a videotape of the examinations after-the-fact – counsel for Mr. Panetti will be unable to challenge the experts or explain the inadequacies of their competency evaluations at the hearing. Such a proceeding does not comport with the minimum due process standards announced in *Ford*.

**9. Motion to Transcribe All Proceedings**

None of the status conferences conducted by the Court thus far have been recorded or transcribed. Because the federal district court and the U.S. Court of Appeals for the Fifth Circuit will have the opportunity to review this Court's resolution of Mr. Panetti's competency-to-be-executed claim – should this Court find him competent – the need for a complete record is critical to counsel's ability to preserve and present issues for federal review. Transcribing all proceedings related to the competency determination must begin immediately, because the Court has been deciding significant issues and ruling on important motions in the absence of a court reporter. The lack of a complete and accurate record of these proceedings will hamper counsel's ability to seek review of the Court's decisions in the federal courts.

ACCORDINGLY, the Court should reconsider its decision of February 25, 2004, rendering moot and denying the majority of the defense motions by refusing to explicitly address the motions until after the court-appointed mental health experts have completed their competency evaluations of Mr. Panetti.

A proposed order is attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

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GEORGE V. C. PARKER, PH. D.
CLINICAL AND FORENSIC PSYCHOLOGY
CONFIDENTIAL INFORMATION

April 28, 2004

Honorable Stephen Ables
216th Judicial District Court
Kerr County Courthouse
700 Main Street
Kerrville, Texas 78028

Re: Cause No. 3310; State of Texas vs. Scott Louis Panetti
216th Judicial District Court, Gillespie County, Texas

Dear Judge Ables:

Mary Anderson, M.D. and George Parker, Ph.D. are writing this to you as a report of our evaluation of Scott Panetti, whom we saw on March 24, 2004 at the TDCJ Polunsky Unit located in Livingston, Texas.

Pursuant to your court order, our plan was to perform a psychiatric/psychological interview of Mr. Panetti, and to administer at least one personality assessment psychometric study (Personality assessment Inventory) to him. Our intent was to gather data that would permit us to provide our professional opinions regarding the issues specified in Article 46.05 of the Texas Code of Criminal Procedure.

OVERVIEW OF OUR INTERVIEW:

Throughout our interview, Mr. Panetti was uncooperative. He ignored our repeated questions about matters such as why he is in prison and whether he had been convicted of capital murder. He even avoided answering our question about where he had grown up. He responded to our questions by filibustering about the Bible and the Lord. Our attempts to redirect him were met with irritable scorn,

accusations that we lied to him, and/or excursions into prayer and hymn singing.

DETAILS OF OUR INTERVIEW:

We found Mr. Panetti seated and waiting for us as we entered the interview room. It became clear from the very beginning that Mr. Panetti intended to control the interview. His controlling behavior began even as we were seating ourselves. He did not respond to our greetings. With glowering countenance, he immediately asked, first of Dr. Parker, then of Dr. Anderson, "Are you a Christian?"

Initially, neither of us responded to his question. As Mr. Panetti glowered at us, we identified ourselves by name and profession, and explained to him the nature of our visit.

We told him that we were court appointed by Judge Ables for the purpose of evaluating him regarding the issue of his competence to be executed. We told him that what transpired during our interview with him was not confidential, and that it could be used against him in a court of law. Mr. Panetti continued to glower, and when we asked him whether he understood the purpose and nature of our visit, his response was to reiterate: "Are you a Christian?" We explained to him that we needed to talk to him about himself, not about our religious beliefs, and that there were some specific questions that we needed to ask him. He stubbornly persisted with his question, and began preaching to us about the Bible and the Lord. After several minutes, it became clear that we were at loggerheads, and that Mr. Panetti was not going to respond to our questions unless we answered his question. Therefore, in an effort to encourage Mr. Panetti's cooperation and get the interview moving, we disclosed to him that we are Christians.

Unfortunately, that seemed to make the situation worse. Because now, continuing to glower at us, he told us that we were liars. Since it is important that there be at least a reasonable degree of trust in the evaluation relationship, we attempted to resolve the liar/trust issue. But that was largely to no avail. He refused to tell us why he labeled us liars.

*Examples of Mr. Panetti's Interview Responses*:

Q. Why are you here in prison?
A. In order to preach the gospel of the Living King.

Q. Is there another reason why you're here in prison?
A. That's all been documented. You can look at the documents.

Q. Sir, did you kill somebody?
A. That's what they put in the newspapers that publish lies. I'm only a messenger . . . pray for peace in Jerusalem. (He then launched into prayer, referred to Article 33 of the UCMJ, loudly sang Onward Christian Soldiers, and talked about how AA wants to keep you coming back).

Q. You are on death row right now. Why?
A. They don't want me to preach the Word of God.

Q. Who are "They"?
A. You can't understand unless you accept the Lord. Is your name on the Book of Life?

Q. Are you saying that you didn't kill some people? I'm asking you a direct question and you're not giving me a direct answer. Were you convicted of capital murder?
A. You tell me lies and I'm telling you the truth. You want to hear it from the horse's mouth, and the horse isn't saying what you want.

Q. Were you convicted of capital murder?
A. I have lost the ability to choose. I do not know right from wrong. But the Lord does. And so I follow the Lord.

Q. Were you convicted of capital murder? Just yes or no?
A. All answers are in the Bible.

Q. I'm asking you a direct question. How come you won't give me a direct answer?
A. Do unto others as you would have them do unto you. Do you remember the first question I asked you?

And so it went for an hour.

*DOCUMENTS AND COLLATERAL DATA RELIED UPON*: In view of Mr. Panetti's refusal to talk with us about the issues at hand, it was especially important for us to rely upon collateral data to help establish a basis for our professional opinions. These data included:

1. Current TDCJ Medical Chart

2. Current Administrative Chart including visitor's log

3. Discussions with prison staff:

– The medical records administrator told us that the day previous to our visit she went to Mr. Pannetti asking him to sign a release of records for Drs. Parker and Anderson. Mr. Pannetti, however, refused to sign it, saying that his lawyer had not told him to do so.

– From our discussion with the Polunski Unit senior Death Row officer (Major Steve Miller), we learned that Major Miller's opinion is that Mr. Panetti clearly understands that he is to be executed, and that he knows why he is to be executed.

– Major Miller also informed us about the existence of Mr. Panetti's Execution Packet, which contains information showing that Mr. Panetti understood that his execution was imminent, and that he would die from his execution. Mr. Panetti's Execution Packet is dated January 22, 2004.

4. Review of several letters (personal correspondence) which Mr. Panetti has recently written to friends and family. Consistent with his preoccupation with religion, these letters contain numerous Biblical references. However, these letters also contain text which reveals that Mr. Panetti is able to form and verbalize normal, socially-appropriate thoughts when he chooses to do so.

5. Competency Trial Transcripts 09/09/94 Vols. 13 and 14 of 43.

6. Petition for a Recommendation of a Reprieve from Execution and a Commutation of Death Sentence. Before the Texas Board of Pardons and Parole.

7. Defendant's Motion to Determine Competency to be Executed.

8. Order Denying Applicant's Motion to Determine Competency to be Executed.

9. Order Granting Motion to Determine Competency [216th Judicial District Court]

10. Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti.

11. Orders to Disclose Records from 216th Judicial District Court of Gillespie County.

12. Code of Criminal Procedure Article 46.05 Competency to be Executed.

13. Mr. Panetti's TDCJ Medical and Administrative Records 1995-2004.

14. Psychiatric Evaluation Report from E. Lee Simes, M.D. dated 11/06/92.

## OPINIONS

The following are our opinions to a reasonable degree of psychiatric and psychological probability:

1. Mr. Panetti is able to understand direct questions about his past as well as his present situation, and he could answer questions about relevant legal issues regarding his execution if he were willing to do so.
2. Mr. Panetti consciously chose not to answer our interview questions about his past and his present, as well as questions about legal aspects of his execution.
3. Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics.
4. Mr. Panetti knows that he is to be executed, and that his execution will result in his death.
5. Although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed.

We will be available to answer any questions that you may have about the above.

Sincerely,

/s/ Mary I. Anderson, M.D.
Mary I. Anderson, M.D.

/s/ G. Parker, Ph.D.
George Parker, Ph.D.

[SEAL]

STEPHEN B. ABLES
DISTRICT JUDGE
216TH JUDICIAL DISTRICT COURT
KERR COUNTY COURTHOUSE
700 MAIN STREET
KERRVILLE, TEXAS 78028

[Names And Other Addresses Omitted In Printing]

May 14, 2004

(Filed May 18, 2004)

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Attorney at Law
521 Earl Garrett
Kerrville, Texas 78028

Mr. Michael Gross 210.354.1920
Attorney at Law
106 S. St. Mary's Street, Suite 260
San Antonio, Texas 78205

Re: Cause No. 3310
The State of Texas v. Scott Louis Panetti

Dear Counsel:

It appears from the evaluations performed by Dr. Mary Anderson and Dr. George Parker that they are of the opinion that Mr. Panetti is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.

Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004.

Very truly yours,

/s/ Stephen B. Ables
Stephen B. Ables
216th District Judge

SBA:bh

CAUSE NO. 3310

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE DISTRICT COURT |
| V. | § | OF GILLESPIE COUNTY, |
| | § | TEXAS |
| SCOTT LOUIS PANETTI | § | 216TH JUDICIAL DISTRICT |
| | § | |

OBJECTIONS TO EXPERTS' REPORT, RENEWED MOTION FOR FUNDS TO HIRE MENTAL HEALTH EXPERT AND INVESTIGATOR, RENEWED MOTION FOR APPOINTMENT OF COUNSEL, AND MOTION FOR COMPETENCY HEARING

(Filed May 21, 2004)

(File Stamped May 24, 2004)

Counsel for Defendant Scott Panetti objects to the methods employed and the conclusions reached by the court-appointed experts. He urges the Court to give the experts' opinions no credence. Counsel's objections to the appointed experts' ultimate conclusions are by necessity limited, however, because Counsel does not possess any expertise in the field of mental illness and is without the assistance of his own expert. Accordingly, Counsel renews his request for funds to hire a defense mental health expert to evaluate Mr. Panetti, review the court-appointed experts' report, and assist Counsel in questioning those experts at an evidentiary hearing. Counsel also seeks funds to hire an investigator to assist him in identifying, collecting, and reviewing collateral documents related to Mr. Panetti's current and past mental functioning. Counsel renews his request for the Court to appoint him nunc pro tunc to February 4, 2004, because he has been providing extensive services to Mr. Panetti without compensation in this matter since that time. Finally, Counsel asks

this Court to order a "final competency hearing" as mandated by Article 46.05.

## I. OBJECTIONS TO EXPERTS' REPORT

Identifying the standards for conducting competency evaluations enables the courts to make informed decisions whether the assessment techniques used by mental health experts meet the hallmarks of accuracy and trustworthiness necessary to satisfy *Ford v. Wainwright,* 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. Only by ordering the appointed mental health experts to adhere to accepted practices for determining competency can the courts ensure that justice will not be doled out arbitrarily and that the truly incompetent will not be executed. The use of increasingly sophisticated protocols for assessing execution competency should discourage simplistic "drive-by" *Ford* examinations by inexperienced and unqualified court-appointed metal health experts left to their own devices. The professional literature describes the standard of practice in assessing an inmate's execution competency. *See* P.A. Zapf, et. al, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist,* 21 BEHAV. SCI. LAW 103-20 (2003) (hereinafter "*Professional Guidelines*") (attached as Exhibit 1 to Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations); Bruce Ebert, Ph.D., J.D., ABPP, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane,* 25 LAW & PSYCHOLOGY REV. 29 (Spring 2001) (hereinafter "Ebert").

The report authored by the court-appointed experts, Dr. George Parker and Dr. Mary Anderson, confirms Counsel's fear that, in the absence of an order requiring the experts to follow professional standards in conducting a determination of competency for execution, a "drive-by" examination would result. The evaluation was incomplete, the collection of collateral data minimal, and the opinions contained in the report biased and conclusory. The court-appointed experts' competency determination is unreliable. This Court should not resolve the issues based on it.

### A. Article 46.05 requires separate evaluations and reports from at least two experts – not a joint examination and a single, co-authored report.

Once the trial court determines that the defendant has made a substantial showing of incompetency to be executed, Article 46.05 requires the appointment of "at least two mental health experts" to examine the defendant. TEX. CODE CRIM. PRO. art. 46.05(f). The mental health experts must then provide "copies of ***their reports***" to the trial court and the parties. TEX. CODE CRIM. PRO. art. 46.05(i) (emphasis added); *see* art. 46.05(k) (referring to the "***reports*** provided under Subsection (i)") (emphasis added). Article 46.05's express reference to "reports" plainly means that the trial court shall have the benefit of at least ***two*** reports – one from each of the minimum number of experts required to be appointed under the statute. The rationale for such a requirement is obvious: facilitating the trial court's ability to make a reliable determination of competency by providing it with at least two independent evaluations and conclusions. The appointment of two mental health experts who then conduct

a joint examination and file a single, joint report defeats the statute's purpose. The procedure adopted by the mental health experts in Mr. Panetti's case deprived the Court of at least two independent judgments and reports on Mr. Panetti's competence. Article 46.05 requires the Court to appoint another mental health expert to conduct an evaluation and write a report.

### B. The court-appointed experts visited Mr. Panetti only once. The Professional Guidelines emphasize the need for multiple visits.

Evaluating a prisoner's competency for execution in accordance with professional norms requires multiple interviews under conditions adequate to assess the prisoner's functioning: "CFE [Competency For Execution] evaluators should seek to meet with the offender ***on more than one occasion as part of an assessment of consistency, deterioration, improvement, and other changes.***" *Professional Guidelines* at 109 (emphasis added). Ebert agrees that the need to see the inmate more than once is an essential component of a comprehensive and reliable determination of competency:

> There is no substitute for a clinical interview of the inmate by the mental health professional which should encompass spending time with the inmate and discussing the inmate's life in prison. ***The doctor should meet with the inmate continually with multiple visits lasting one to two hours each. Often testing and evaluating an inmate can last up to eight hours. A minimum of three to four clinical interviews are usually necessary to properly and thoroughly evaluate an inmate's competency to be executed.*** Furthermore, as the amount of

> time the mental health professional spends with the inmate increases, the clinical database increases and provides more information about the inmate. Though the clinical interview is often under emphasized, it is used more adeptly by psychiatrists.

Ebert at 51.

According to the experts' report, Dr. Parker and Dr. Anderson attempted to interview Mr. Panetti, simultaneously, for one hour on only a single occasion. Experts' Report at 1, 3. This is not acceptable practice, especially when the experts believe the inmate is being uncooperative. The experts made no second attempt to establish a degree of trust with Mr. Panetti or overcome what they perceived as his controlling and manipulative behavior. They could make no assessment of the consistency, improvement, or deterioration of his condition over a period of time. Instead, they simply abandoned the clinical interview, one of the most critical tools in the competency evaluation. *See* Ebert at 51 ("Direct observation and interviews of the inmate are of critical importance in the evaluation of competency").

### C. The court-appointed experts conducted no psychological testing. The Professional Guidelines emphasize that psychological testing is an essential component of a reliable determination of execution competency.

According to the *Professional Guidelines,* the competency determination must involve psychological testing:

> CFE evaluators should be aware of the psycholegal abilities required of a competent offender. In the absence of a standardized assessment instrument specifically developed to assess the psycholegal criteria for a given jurisdiction, the evaluator should operationalize the applicable psycholegal criteria. Evaluators should focus on the functional abilities of the offender, in addition to the mental state of the offender and the appropriate diagnosis of a mental disorder, and should document how any functional deficits may be causally related to mental, emotional, or intellectual deficits.

*Id.* at 110. This is consistent with the reported practices of mental health experts experienced with evaluating competency for execution: "The CFE evaluators reported using a number of different psychological tests during CFE evaluations." *Id.* at 112.

Similarly, Ebert notes that the competency examination should include psychological testing. The expert should also administer a battery of intellectual measure, including tests that document language skills, memory, and cognition. Ebert at 49-50. Ebert also stresses the need for conducting a mental status examination to ascertain whether the inmate is experiencing any severe symptoms of psychopathology such as hallucinations, delusions, illusions, tangentiality, or loose associations. *Id.* at 48. "In summation, testing procedures administered to an inmate subject to execution should be thorough and conducted to the fullest and most accurate extent possible so as to avoid misdiagnosis or other misevaluations." *Id.* at 50.

The court-appointed experts did not conduct any psychological testing of Mr. Panetti's current mental and intellectual functioning. They did not attempt to determine

whether he suffers from any mental illness. They failed to take into account his documented, twenty-year history of schizophrenia. The lack of psychological testing calls into serious question the accuracy of their conclusions.

### D. The court-appointed experts' collection and review of collateral information was haphazard and incomplete.

The experts' report lists fourteen pieces of collateral information that the experts reviewed and relied upon in making their competency determination, Experts' Report at 3-4. At first glance, this list may appear comprehensive. When compared to the minimum standards for an adequate and reliable competency determination, it quickly becomes apparent that the experts failed to gather collateral information from an array of important sources.

Ebert has identified a lengthy list of information critically important to developing a complete social history so that the expert can fully understand the inmate's current situation. Background history includes asking detailed questions in the following areas:

(1) Military Background
(2) Educational History
(3) Marital and Relationship History
(4) Legal Background
(5) Sexual History
(6) Medical History
(7) Psychological and Psychiatric History
(8) Family History
(9) Employment History
(10) Developmental History
(11) Alcohol and Drug History
(12) Social Functioning/History

(13) Disciplinary History while in Prison
(14) History of Transfers from Various Prisons and Reason for Them.

Ebert at 47-48.

The *Professional Guidelines* note that, to evaluate a prisoner's competency for execution in accordance with professional norms, mental health experts require access to a wide range of information:

> CFE evaluators should collect collateral information about the offender's previous and current functioning, as well as his or her functioning while on death row (including any specific behaviors that the offender has engaged in that might be relevant to psycholegal understanding). Friends and family of the offender who can comment on previous and current functioning and characteristics should be interviewed. Correctional officers, prison physicians and psychologists, and other prisoners should be asked to comment on the behavior of the offender while in the institution. Medical records and psychiatric history both within and outside the correctional institution should he gathered and evaluated.

*Professional Guidelines* at 110-11 (footnote omitted).

Ebert also strongly recommends interviewing collateral contacts. According to Ebert, "collateral contact" is "a common term used in forensic evaluations and involves interviewing people, such as prior health care providers and psychiatrists/psychologists who have treated or evaluated the inmate, the inmate's family members, counsel for the inmate, the spouse or the offspring of the inmate, fellow inmates who have interacted with the inmate, correctional officers and religious personnel who have had contact with the inmate, friends who have

visited the inmate over the past few years (to identify the period of incompetency) and any other individuals who have witnessed the inmate's behaviors." Ebert at 50 n.156. Collateral contacts may offer crucial information that the evaluator can then compare with objective sources of data, such as psychological testing. *Id.* at 50.

Like the *Professional Guidelines,* Ebert recognizes the importance of conducting an exhaustive review of the inmate's records to assist an evaluator in determining the true level of competency or incompetency of an inmate. This review should include, but is not limited to, the following records and documents:

(1) prison medical records;
(2) prison psychiatric records;
(3) psychiatric records prior to incarceration;
(4) academic records, including prior intellectual testing with raw data;
(5) records of past psychological evaluations;
(6) any and all videotapes made of the inmate;
(7) military or veterans affairs records;
(8) records/transcripts of testimony of the inmate;
(9) writings/letters of the inmate with the prior year;
(10) videotapes of the inmate demonstrating bizarre behavior; and
(11) art work of the inmate.

*Id.* at 49-50.

The court-appointed experts's collection of collateral data was woefully inadequate. A number of documents the experts listed clearly had no bearing on Mr. Panetti's previous or current mental and intellectual functioning: Order Denying Motion to Determine Competency (Item no. 8), Order Granting Motion to Determine Competency (Item no. 9), Motion Seeking Order Setting Out Protocol

for Conducting Competency Evaluations (Item no. 10), Orders to Disclose Records (Item no. 11), and Article 46.05 of the Code of Criminal Procedure (Item no. 12). *See* Experts' Report at 3-4. Other documents the experts reviewed did have some relevance to Mr. Panetti's mental status: TDCJ medical and administrative records (Item nos. 1, 2, 13), some personal correspondence (Item no. 4), transcripts from one of the competency trials (Item no. 5), the clemency petition (Item no. 6), Motion to Determine Competency (Item no. 7), and a 1992 psychiatric evaluation report (Item no. 14). *Id.* However, the experts made no effort to obtain or review a significant portion of the kinds of collateral documents necessary for an expert to make a reliable competency determination. The court-appointed experts did not collect numerous medical and psychiatric records from Mr. Panetti's stays at Kerrville State Hospital, Starlite Village, Waco Veterans Administration Hospital, Tomah Veterans Administration Hospital, Northern Pines Unified Service, Cumberland Memorial Hospital, and the Bell County Jail. They did not review the transcript of Mr. Panetti's first competency trial that ended in a hung jury. They did not read the transcripts of Mr. Panetti's capital murder trial, in which he testified and represented himself. They did not obtain his military records. They did not review his academic records. They did not obtain a family history, marital and relationship history, alcohol and drug history, employment history, social functioning and development history, educational history, or medical history.

The court-appointed experts conducted interviews with only two collateral contacts – a TDCJ medical records administrator and a correctional officer. *Id.* at 3-4. The experts did not speak with any prison psychiatrists or

psychologists. They did not talk to other prisoners housed near Mr. Panetti. They did not interview mental health professionals who treated Mr. Panetti during his many previous hospitalizations. They did not attempt to speak with Mr. Panetti's ex-wife or his parents. They did not talk to spiritual advisors or friends who had recently visited Mr. Panetti. They made no effort to observe Mr. Panetti in his prison cell. It is clear that a significant amount of document collection, social history investigation, and collateral contact interviews must be completed before any evaluation can proceed under the professional standard of care governing competency-to-be-executed determinations.

### E. The court-appointed experts' competency determination is conclusory and fails to take into account Mr. Panetti's lengthy and well-documented history of severe mental illness.

The report of the court-appointed experts is incomplete, biased, and conclusory. The inadequacy of the report is unsurprising, given the experts' failure to meet with Mr. Panetti more than once, their inability to conduct any psychological or intellectual testing, their incomplete collection and review of collateral documents, and their reluctance to interview a wide range of collateral contacts. Under these conditions, qualified mental health professionals should flatly refuse to make a competency determination. Unfortunately, the court-appointed experts had no qualms about voicing their opinions.

A careful review of the experts' report reveals its many shortcomings. Beginning on the first page, the experts' biases are evident. The experts immediately describe Mr. Panetti as "uncooperative" – "ignoring" and "avoiding"

repeated questions relevant to the *Ford* inquiry. Experts' Report at 1. The experts characterize Mr. Panetti's responses as "filibustering about the Bible and the Lord." *Id.* The experts describe their futile attempts to redirect Mr. Panetti as being met "with irritable scorn, accusations that we lied to him, and/or excursions into prayer and hymn singing." *Id.* They state, "It became clear from the very beginning that Mr. Panetti intended to control the interview." *Id.* Four times, the report uses the word "glower" to describe Mr. Panetti's expression while he "stubbornly persist[s]" with his question to Dr. Anderson: "Are you a Christian?" *Id.* at 1-2.

After attempting to explain the reason for their visit, the experts said that "it became clear we were at loggerheads." *Id.* at 2. Reluctantly, they answered Mr. Panetti's question affirmatively. *Id.* The experts then realized that answering the question made the situation worse. Mr. Panetti accused them of being "liars." *Id.* The experts eventually conceded that they were unable to establish "a reasonable degree of trust in the evaluation relationship." *Id.* The report then includes a lengthy colloquy between the experts and Mr. Panetti, in which Mr. Panetti answers their *Ford* inquiries with references to the Bible and the Lord. He does, however, unambiguously state that he is on death row, because "[t]hey don't want me to preach the Word of God." *Id.* The experts continued their questioning for an hour before terminating the clinical interview. *Id.* They abandoned their plan "to perform a psychiatric/psychological interview of Mr. Panetti, and to administer at least one personality assessment psychometric study (Personality Assessment Inventory) to him." *See id.* at 1. They made no attempt to re-visit Mr. Panetti on another date.

Because of Mr. Panetti's "refusal to talk with [the experts] about the issues at hand," the experts emphasized the importance of relying on collateral data instead to form their opinions. *Id.* at 3. Unfortunately, as noted in Part I-D, *supra*, the experts reviewed only a small portion of the vast array of collateral information relevant to making a reliable competency determination that conforms with professional standards. Their discussion with the TDCJ medical records administrator is particularly unilluminating. The administrator stated that Mr. Panetti refused to sign a records release form, because "his lawyer had not told him to do so." *Id.* at 4. The report also notes the experts' conversation with a correctional officer, who gives his conclusory opinion that Mr. Panetti "understands that he is to be executed, and that he knows why he is to be executed." *Id.* The report provides no additional information that explains how often this correctional officer interacted with Mr. Panetti, how long he has known Mr. Panetti, whether Mr. Panetti's behavior has been consistent during the time he has known him, or even how he formed his opinion about Mr. Panetti's competency. Finally, the experts describe their review of some of Mr. Panetti's personal correspondence: "Consistent with his preoccupation with religion, these letters contain numerous Biblical references. However, these letters also contain text which reveals that Mr. Panetti is able to form and verbalize normal, socially-appropriate thoughts when he chooses to do so." *Id.*

After setting out the laundry list of collateral documents they reviewed, the court-appointed experts then immediately set out their conclusions in summary fashion – without any logical explanation, without any deductive reasoning, without any careful extrapolation based on the

documents they reviewed, their interviews with collateral contacts, or their conversation with Mr. Panetti. This is, by far, the most stunning aspect of the entire report. It leaves the reader to wonder whether the experts omitted several pages of their report. The experts' failure to explain their findings is simply another indicator of the "drive-by" nature of their competency evaluation.

The experts set out five conclusions on the final page of the report:

> 1. Mr. Panetti is able to understand direct questions about his past as well as his present condition, and he could answer questions about relevant legal issues regarding his execution if he were willing to do so.
>
> 2. Mr. Panetti consciously chose not to answer our interview questions about his past and his present, as well as questions about legal aspects of his execution.
>
> 3. Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics.
>
> 4. Mr. Panetti knows that he is to be executed, and that his execution will result in his death.
>
> 5. Although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed.

*Id.* at 5.

It is difficult, if not impossible, for the reader to comprehend these conclusions based on the four pages of the report that preceded them. Not once did the court-appointed experts acknowledge that Mr. Panetti has a long

and undisputed history of suffering from schizophrenia. Nowhere do the experts consider the possibility that what they perceived as Mr. Panetti's "controlling" and "manipulative" behavior – as well as his occasional interludes of lucidity – are characteristic of persons diagnosed with schizophrenia. Their conclusion that Mr. Panetti was "consciously" and "deliberately" choosing to be uncooperative, without even struggling over whether this behavior was indeed a conscious choice or, instead, a manifestation of his mental illness, is breathtaking.[1] In a similar fashion, the experts characterize his ramblings about the Bible and the Lord as a harmless "preoccupation with religion," *id.* at 4, rather than the foundation of his elaborate delusional system. Finally, in light of Mr. Panetti's clearly-stated response to the *Ford* inquiry that he is on death row because "[t]hey don't want me to preach the Word of God," *id.* at 2, it is difficult to follow how the experts could have

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[1] Although the court-appointed experts do not explicitly state it, their use of words like "control and manipulate," "deliberately and persistently chose," and "consciously chose" to describe Mr. Panetti's behavior during the interview suggests that they believe Mr. Panetti is malingering mental illness. If this is indeed what the experts are implying, their opinion contradicts two decades' worth of his documented mental health history. On occasion, and without resort to any of the currently accepted assessment and evaluation mechanisms, mental health professionals will decide that an inmate is malingering mental illness, and will essentially "trump" a serious competency examination by concluding that the inmate is malingering, and therefore is probably competent. However, well-respected literature describes what would be acceptable. Knowledgeable experts have discussed the politics of the assessment of malingering, and the science involved in such assessments. Rogers, CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (2d ed. 1997). The court-appointed experts administered no assessment mechanisms to test for malingering. The Court should reject the experts' implicit and wholly unfounded suggestion that Mr. Panetti is malingering.

concluded that Mr. Panetti "understand[s] the reason he is to be executed." *Id.* at 5.

The brief interview that Dr. Mark D. Cunningham performed three months ago is instructive, because Dr. Cunningham reached dramatically different conclusions based on his witnessing nearly identical behavior by Mr. Panetti. On February 3, 2004, Dr. Cunningham, a clinical and forensic psychologist, conducted a pro bono, preliminary mental health evaluation of Mr. Panetti. Dr. Cunningham prepared a report of his impressions, which Counsel attached to his Renewed Motion to Determine Competency to be Executed.

Dr. Cunningham found that Mr. Panetti's thought processes are "markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought." Cunningham Report at 1. He said that Mr. Panetti exhibits "flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection; tangentiality (using any inquiry as a starting point to expand into other subjects); and circumstantiality (providing excessive and irrelevant detail)." *Id.* More important, Dr. Cunningham found that:

> Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken [sic] national headquarters in Wisconsin, but also reached even into "the administration." ***Mr. Panetti attributed the primary reason for his execution to the efforts***

> ***of these evil forces to prevent him from continuing to preach the gospel.***

*Id.* (emphasis added). Dr. Cunningham diagnosed Mr. Panetti as "actively psychotic" and "suffer[ing] from a disorder on the Schizophrenic and/or Schizoaffective spectrum." *Id.* at 2. He concluded that Mr. Panetti is not malingering. *Id.*

"[T]he more unstructured and vague the criteria and goals are for any given task, the more likely it is that a clinician's own values and biases will impose on the task." *Professional Guidelines* at 108. Unfortunately, that is exactly what happened with the court-appointed experts. Their refusal to follow accepted professional standards for competency-to-be-executed examinations undermined the integrity of their opinions. Their failure to adhere to professional norms calls into serious question the accuracy and reliability of their conclusions. Accordingly, the Court should give no credence to the court-appointed experts' report. Instead, it should appoint another expert, and order that expert to conduct a competency evaluation in accordance with the Professional Guidelines and produce a second report for the Court's benefit, as required under Article 46.05.

## II. THE RENEWED MOTIONS

Counsel for Mr. Panetti renews his previous motions for funds to hire a mental health expert and investigator, and for appointment of counsel, Counsel refers the Court to the motions he has previously filed on these issues to find more detailed legal argument. He summarizes those arguments below.

### A. Motion for Funds to Hire Mental Health Expert

Counsel for Mr. Panetti is, obviously, at a severe disadvantage in reviewing the adequacy and reliability of the procedures used and the conclusions reached by the court-appointed experts. He has no expertise in this area. For this reason, it is imperative that the Court provide him with funds so that he may retain his own mental health expert to assist him. In *Ford v. Wainwright*, 477 U.S. 399 (1986), Justice Powell assumed that the death-sentenced inmate would have the assistance of a mental health expert separate from any State's experts or court-appointed experts:

> ***[T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.*** Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

*Id.* at 424 (Powell, J., concurring in part and concurring in the judgment) (emphasis added). Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement that included the need for a defense mental health expert: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, ***including expert psychiatric evidence that may differ from the State's own psychiatric examination***." *Id.* at 427 (emphasis added). Clearly, *Ford* demands, through the Eighth and

Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination.

### B. Motion for Funds to Hire Investigator

The Professional Guidelines recognize that an objective and reliable assessment of competency requires the collection of extensive social history records, prior psychological and psychiatric evaluations, medical records, and many other types of documentation. Identifying and obtaining all of the relevant collateral documents, along with interviewing mental health professionals, friends and family, correctional staff, and other prisoners is a time-consuming task. Hiring an investigator who can gather this crucial information is more cost-effective than requiring either the mental health experts or Counsel to perform these tasks. Accordingly, this Court should provide funds for Counsel to retain an investigator to assist him in these competency proceedings.

### C. Motion for Appointment of Counsel

*Ford* assumes that an inmate who makes a substantial threshold showing of incompetence will be represented by counsel during the competency determination proceedings. In appointing at least two mental health experts, this Court has concluded that Mr. Panetti made such a threshold showing in his last Article 46.05 motion. Accordingly, this Court should now appoint undersigned counsel and reasonably compensate him nunc pro tunc to February 4, 2004.

## III. MOTION FOR COMPETENCY HEARING

Once an inmate has made a substantial showing of incompetency, not only must the trial court appoint at least two mental health experts, but it also must eventually hold a "final competency hearing" before it makes a determination of the inmate's competency to be executed. *See* TEX. CODE CRIM. PROC. art. 46.05(k) ("If, on the basis of any reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, ***and any evidence introduced in the final competency hearing***, . . . . ") (emphasis added). This Court has already determined that Counsel has raised a substantial doubt about Mr. Panetti's competency to be executed. The Court has appointed at least two mental health experts. After providing Mr. Panetti with appointed counsel and his own mental health expert and investigator, the Court must hold a "final competency hearing."

Proposed orders are attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

/s/ Michael C. Gross
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State Bar No. 08534480
106 South St. Mary's Street, Suite 260
San Antonio, Texas 78205
(210) 354-1919
(210) 354-1920 (Fax)

Attorney for the Defendant,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

**CAUSE NO. 3310**

| | | |
|---|---|---|
| **THE STATE OF TEXAS** | X | **IN THE DISTRICT COURT** |
| **VS.** | X | |
| **SCOTT LOUIS PANETTI** | X | **GILLESPIE COUNTY, TEXAS** |
| | X | **216TH JUDICIAL DISTRICT** |

**ORDER REGARDING**

**COMPETENCY TO BE EXECUTED**

(Signed May 26, 2004)

(File Stamped June 3, 2004)

Pursuant to Article 46.05 of the Texas Code of Criminal Procedure, this Court appointed Mary Anderson, M.D. and George Parker, Ph.D., to conduct a competency examination.

The two aforesaid experts were appointed by the Court to determine whether or not the Defendant, Scott Louis Panetti, is competent to be executed based on standards set out in Subsection H, Article 46.05 of the Code of Criminal Procedure. Attached to this Order are the findings of Dr. Anderson and Dr. Parker.

It appears from the doctors' reports that the Defendant, Scott Louis Panetti, understands that he is to be executed; that the execution is imminent; and that the Defendant understands the reasons he is being executed.

Based on the aforesaid doctors' reports, the Court finds that the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed.

ORDERED this 26th day of May, 2004

/s/ Stephen B. Ables
STEPHEN B. ABLES
Judge Presiding

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| **SCOTT LOUIS PANETTI,** | § | |
| | § | |
| **P** | § | |
| | § | |
| **V.** | § | **CIVIL CASE** |
| | § | **NO. A-04-CA-042-SS** |
| **DOUG DRETKE, D** | § | |
| **T D C** | § | |
| **J I D** | § | |
| | § | |
| **R** | § | |

**SECOND MOTION TO RECONSIDER**

(File Stamped Feb. 4, 2004)

On January 30, 2004, this Court urged Counsel for Petitioner Scott Louis Panetti to provide some factual allegations concerning Mr. Panetti's current competency to be executed. *Panetti v. Dretke,* No. A-04-CA-042-SS (W.D. Tex. Jan. 30, 2004), slip op. at 5. Since that time, Counsel himself has visited Mr. Panetti and secured the pro bono services of Dr. Mark D. Cunningham, a psychologist, who also spoke with Mr. Panetti. In addition, Counsel has attached the declaration of David R. Dow, a law professor and lawyer, who accompanied Dr. Cunningham on his interview with Mr. Panetti. Accordingly, Counsel can now provide this Court with compelling evidence in support of his claim that Mr. Panetti is not currently competent to be executed under *Ford v. Wainwright,* 477 U.S. 399 (1986). In light of this new evidence, Counsel asks this Court to reconsider its earlier decision. The recent information about Mr. Panetti's mental state entitles him to a stay of execution and funds for Counsel to hire Dr. Cunningham to conduct a thorough mental health evaluation of Mr.

Panetti. Counsel must have a full and fair opportunity to develop the facts of the *Ford* claim before this Court can make a reliable determination of Mr. Panetti's competency to be executed.[1]

## I. Counsel's recent visit with Scott Panetti

On February 2, 2004, Counsel visited Scott Panetti for over an hour on death row at the Polunsky Unit in Livingston, Texas. Mr. Panetti does not understand the reasons he is to be put to death on Thursday. ***He believes that he is being executed because of a conspiracy to prevent him front preaching the gospel.*** Scott told me that he is still able to preach the gospel even in the face of this conspiracy. He said that the Devil would chuckle about his death, but that he would triumph with the Lord over the Devil. Scott told me how some inmates began yelling to the guards about his preaching the gospel, but that this incident was further evidence of the Devil's efforts to stop him from evangelizing. In sum, I do not believe that Scott Panetti is competent to be executed.

Scott brought a small bible with him to the visitation area. It was well-worn and tabulated. I asked him which translation of the bible he uses. He told me that he prefers the King James version. Scott then talked about the Revised King James version before discussing other translations of the bible. He jumped from this topic to telling me that he was being persecuted for preaching the

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[1] In an attempt to exhaust these new facts, Counsel has simultaneously provided the state trial court with the same evidence of Mr. Panetti's current mental status in a renewed motion to determine competency under Article 46.05 of the Texas Code of Criminal Procedure.

gospel. He described how prison guards had placed him handcuffed in a room filled with inmates. He said that the guards had allowed the inmates to beat him, but that the Holy Spirit had allowed him to free himself from the handcuffs and defend himself.

I asked Scott if he had received the legal documents I had sent him over the last few months. He said that he had received the documents but that he did not understand them because he is not a lawyer. Scott then told me that he no longer has the documents. He said that, immediately after he reads a page of any legal document, he destroys that page, reads the next page and then destroys it until nothing remains of the original document. Scott told me that he fears a conspiracy will persecute him if he has any legal documents in his possession. He then began talking about being persecuted for preaching the gospel.

Scott's entire conversation with me was characterized by rambling, incoherent, bizarre, and religiously-preoccupied thinking. His gaze was intense and piercing as he spoke in a rapid-fire manner, jumping from one unrelated, irrelevant topic to the next. For example, at one point as Scott was talking about another conspiracy against him, he noticed my Marine Corps ring and suddenly began talking about life in the military service. He then spoke about preaching the gospel in the service. He talked non-stop. Throughout the interview, I had to interrupt him to, make a statement or ask a question. My attempts to keep him focused on a particular subject were unsuccessful.

Simply put, Scott is a seriously mentally ill man who has absolutely no rational understanding of the connection between his crime and why he is to be executed.

## II. Dr. Mark D. Cunningham's preliminary evaluation of Scott Panetti

Dr. Mark D. Cunningham, a clinical and forensic psychologist, agreed to assist Counsel pro bono and conduct a preliminary mental health evaluation of Mr. Panetti. On February 3, 2004, Dr. Cunningham interviewed Mr. Panetti for over an hour-and-a-half on death row at the Polunsky Unit. Dr. Cunningham prepared a brief report of his impressions for Counsel. It is attached as Exhibit 1 to this motion.[2]

Dr. Cunningham found that Mr. Panetti's thought processes are "markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought." Cunningham Report at 1. He said that Mr. Panetti exhibits "flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection; tangentiality (using any inquiry as a starting point to expand into other subjects); and circumstantiality (providing excessive and irrelevant detail)." *Id.* Moreover, Dr. Cunningham found that:

> Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken [sic] national headquarters in Wisconsin, but also reached even into "the administration." ***Mr. Panetti attributed the primary reason for his execution to the efforts***

[2] For the Court's convenience, Dr. Cunningham's curriculum vitae is attached to this motion as Exhibit 2.

***of these evil forces to prevent him from continuing to preach the gospel.***

*Id.* at 1 (emphasis added).

Dr. Cunningham diagnosed Mr. Panetti as "actively psychotic" and "suffer[ing] from a disorder on the Schizophrenic and/or Schizoaffective spectrum." *Id.* at 2. He concluded that Mr. Panetti is not malingering. *Id.*

## III. Professor David R. Dow's recent conversation with Scott Panetti

On February 3, 2004, David Dow, a law professor at the University of Houston Law Center who has handled numerous death penalty appeals over the last fifteen years, accompanied Dr. Cunningham on his interview with Scott Panetti. Professor Dow provided Counsel with a declaration about his visit. It is attached to this motion as Exhibit 3.

Like Counsel and Dr. Cunningham, Professor Dow found Mr. Panetti's speech "rambling and disorganized" as he "bounced wildly from topic to topic." Declaration of David R. Dow. According to Professor Dow, Mr. Panetti "freely associated, quoted random and irrelevant biblical passages, and had to be asked the same question numerous times before he could provide a semblance of an answer." *Id.* Professor Dow stated that Mr. Panetti "clearly suffers from delusions" which affect his ability to establish a rational connection between his crime and his punishment: ***"At least six times during the interview, when asked why he was going to be executed, Mr. Panetti responded that evil forces wanted to stop him from preaching the gospels of Jesus Christ".*** *Id.* (emphasis

added). Mr. Panetti believes that "anti-Christian forces" and the "Devil" have been trying to "eliminate" him since his conception, and that these evil forces even "poisoned his mother's breast milk." *Id.* Professor Dow stated that "Mr. Panetti believes that the murder of his mother-in-law and father-in-law was 'a side issue' concocted to justify killing him, so as to end his spreading of the message of Jesus." *Id.* Professor Dow concluded his declaration by stating that, "In more than fifteen years of representing death row inmates, I do not believe I have met anyone who is as obviously and as deeply mentally disturbed as Mr. Panetti clearly is." *Id.*

## PRAYER FOR RELIEF

One of the primary justifications for the death penalty is its retributive force. Justice Powell said in *Ford*, "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied." 477 U.S. at 422 (Powell, J., concurring). Scott Panetti clearly suffers from a severe mental illness that prevents him from rationally understanding the connection between his crime and his punishment. Executing him will not achieve the critical retributive goal of the death penalty. Accordingly, this Court should:

1. Find Mr. Panetti incompetent to be executed and stay his execution scheduled for February 5, 2004, until he becomes competent to be executed;

   or, in the alternative,

2. Stay Mr. Panetti's execution to allow the parties a full and fair opportunity to develop and present reliable evidence about Mr. Panetti's current competency;

3. Appoint and compensate Undersigned Counsel to represent Mr. Panetti in these competency proceedings;

4. Authorize payment of funds for Counsel to retain Dr. Mark D. Cunningham to conduct a complete and thorough mental health evaluation of Mr. Panetti to determine whether he is competent to be executed;

5. Grant Counsel leave to conduct discovery, including the right to obtain Mr. Panetti's medical records from the Texas Department of Criminal Justice, subpoena witnesses, and take depositions essential to the reliable resolution of his *Ford* claim;

6. Hold an evidentiary hearing to resolve any disputed issues of fact about Mr. Panneti's present competency to be executed; and

7. Grant such other relief as law and justice require.

Respectfully submitted,

/s/ Andrea Keilen
TX ID 24036038
with express permission of
Michael C. Gross
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(210) 354-1919
(210) 354-1920 (Fax)

Counsel for the Petitioner,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

**EXHIBIT 1**

MARK D. CUNNINGHAM, PH.D., ABPP
Clinical & Forensic Psychology
*Board Certified in Forensic Psychology – American Board of Professional Psychology*
417 Oak Bend, Suite 260 Lewisville, Texas 75067
972-459-0658 Fax 972-459-0958

02-03-04

Mr. Michael C. Gross, Esq.
Attorney at Law
106 South St. Mary's Street, Suite 260
San Antonio, Texas 78205

Re: Scott Louis Panetti

Dear Mr. Gross:

Please allow me to summarize my concerns regarding the mental status of your client, Mr. Scott Panetti. In my preliminary evaluation of Mr. Panetti today, I interviewed him for 85 minutes at the Polunsky Unit of TDCJ. I subsequently interviewed his older brother Thomas Panetti and sister-in-law Marcia Panetti. I have also reviewed the affidavits of Wolfgang Selck, M.D., Scott Monroe, Esq. (standby trial counsel), and F.E. Seale, M.D., as well as correspondence of Michael R. Arambula, M.D., R.Ph.

1. Mr. Panetti's thought processes are markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought. More specifically, he exhibits flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection), tangentiality (using any inquiry as a starting point to expand into other subjects), and circumstantiality (providing excessive and irrelevant detail). His responses to

inquiry were repeatedly irrelevant, and he had to be continually interrupted and redirected. Often he answered in ways that seemed satisfactory to him, but in fact had not addressed the inquiry at all or only in the most oblique fashion.

2. Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken national headquarters in Wisconsin, but also reached even into "the administration." Mr. Panetti attributed the primary reason for his execution to the efforts of these evil forces to prevent him from continuing to preach the gospel.

3. Mr. Panetti expressed the belief that God may render him invulnerable to lethal injection so that he may go on preaching the gospel.

4. Mr. Panetti reported that he promptly tears up and flushes any legal correspondence or documents regarding his case, as these are "classified documents" and he fears they may fall into "enemy hands."

5. He has no insight into his psychotic thought processes or continuing mental illness, describing that he is a "born again April fool" who God has healed from Schizophrenia and any associated need for medication or treatment.

My diagnostic impression is that Mr. Panetti is actively psychotic, and suffers from a disorder on the Schizophrenic and/or Schizoaffective spectrum.

There is virtually no possibility that Mr. Panetti is malingering his current symptoms. First, the disorganization of thought that he exhibited is extraordinarily difficult to imitate or manufacture. Second, he has a history of psychotic decompensation and inpatient psychiatric treatment that predates his capital offense. Third, my observations are consistent with Mr. Panetti's presentation in the 1997 evaluation performed by Dr. Aramula. Fourth, Mr. Panetti's family described his longstanding thought disorganization.

Please advise me if I can provide additional information or assistance.

Sincerely,

/s/ Mark D. Cunningham
Mark D. Cunningham, Ph.D., ABPP

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**EXHIBIT 3**

DECLARATION OF DAVID R. DOW

My name is David R. Dow. I am a professor of Law at the University of Houston Law Center. In addition to writing scholarly articles and teaching in the areas of constitutional law and death penalty jurisprudence. I have handled, as lead lawyer or co-counsel, more than thirty death penalty appeals since 1988.

On Tuesday, February 3, 2004, I accompanied Dr. Mark D. Cunningham, a clinical and forensic psychologist, for an interview of Scott Panetti in the death row visitation area of the Polunsky Unit of the Texas Department of Criminal Justice.

During the approximately 1.5 hour meeting, it was immediately obvious to me that Mr. Panetti is severely mentally ill. Mr. Panetti's discourse was rambling and disorganized. He was unable to answer simple questions in a linear fashion, and he bounced wildly from topic to topic. He was unable to remain focused on the questions put to him. He freely associated, quoted random and irrelevant biblical passages, and had to be asked the same question numerous times before he could provide a semblance of an answer.

Mr. Panetti clearly suffers from delusions. At least six times during the interview, when asked why he was going to be executed, Mr. Panetti responded that evil forces wanted to stop him from preaching the gospels of Jesus Christ. He stated that "the anti-Christian forces outnumber us," and those forces were attempting to "rub him out."

He stated that since his conception in 1958, the Devil has been trying to eliminate him. He believes that evil forces poisoned his mother's breast milk.

He reported matter-of-factly that when prison officials or other death row inmates have attempted to throw boiling water on him, Jesus has cooled the water before it touched his skin. He similarly reported that when other inmates have shot him with darts from a blowgun, he has not shed any blood.

Mr. Panetti believes that the murder of his mother-in-law and father-in-law was "a side issue" concocted to justify killing him, so as to end his spreading of the message of Jesus. He believes that an alter ego, "Sergeant Iron Horse," carried out the murders.

In more than fifteen years of representing death row inmates, I do not believe I have met anyone who is as

obviously and as deeply mentally disturbed as Mr. Panetti clearly is.

I declare under penalty of perjury under the laws of the State of Texas and the United States of America that the foregoing is true and correct. Executed this 3d day of February, 2004.

/s/ David R. Dow
David R. Dow

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**SCOTT LOUIS PANETTI,**
**Ph**

**-v**

**DOUG DRETKE, D**
**TDp**
**fCh**
**IDp**
**Rp**

**CNoA-04-CA-042-SS**

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**ORDER**

(Filed Feb. 4, 2004)

Before this Court is Petitioner's Second Motion to Reconsider [#10], filed today February 4, 2004. Attached to this motion is a mental health evaluation of Scott Panetti, conducted by Mark D. Cunningham, Ph.D., ABPP, and the sworn declaration of Professor David R. Dow, a law professor who accompanied Dr. Cunningham and observed his evaluation of Panetti. *See* Sec. Mot. to Reconsider Ex. 1 & Ex. 3. On January 30, 2004, the Court entered an Order in which it explained:

> As the Court already explained, the state court held Panetti failed to set forth alleged facts or make a sufficient documentary showing in support his assertion that he is presently incompetent to be executed and therefore failed to make a substantial showing as is required by Article 46.05(6) [of the Texas Code of Criminal Procedure]. The Court has reviewed the Article 46.05 application and record submitted to the state court that are attached to Panetti's motion

for reconsideration. In his application, Panetti outlined his mental health history for the time period from 1981 until 1997. *See* State Court Record, attached to Mot. to Reconsider at 26-34. Therefore, just as with the instant habeas petition pending before this Court, there was no evidence (or allegations) before the state court regarding Panetti's competency *at this time.* Panetti contends the record is devoid of such allegations and evidence because Panetti is indigent and cannot afford a mental health evaluation. He contends that it was an unreasonable application of the Supreme Court's decision in *Ford* for the Texas Court to deny a mental health evaluation in this case. But as the Court explained two days ago, the Fifth Circuit declared the Article 46.05 procedures constitutionally adequate under *Ford* in *Caldwell v. Johnson,* 226 F.3d 367, 374 (5th Cir. 2000). And those procedures require a petitioner to raise a substantial doubt of the defendant's competency to be executed BEFORE a mental health expert will be appointed. *See* Tex. Code of Crim. Pro. Article 46.05. This requirement is consistent with *Ford. Ford,* 477 U.S. at 425-426 (Powell, J. concurring) (stating in his concurring opinion in support of his decisive fifth-vote that the state "may properly presume that petitioner remains sane at the time sentence is to be carried out and may require a substantial threshold showing of insanity merely to trigger the hearing process."). The Court cannot hold that it was unreasonable for the state court to deny Panetti's Article 46.05 motion in light of the allegations and evidence that were presented to it since they wholly fail to address whether or not Panetti knows of his impending execution and the reason for it, the definition of sanity-to-be executed promulgated not only by the Fifth

> Circuit and Texas law, but by the decisive Powell concurrence in *Ford,* a plurality opinion. *See Ford,* 477 U.S. at 422 (Powell, J., concurring) ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."). And neither has Panetti or his counsel presented to this Court any *factual allegations* regarding Panetti's *current* competency, let alone the affidavit of a prison doctor, guard or even Panetti's counsel attesting to his current incompetency. As such, the Court must deny the second motion to stay execution.

Jan. 30, 2004 Order at 4-5. However, Panetti has now presented evidence to support his contention that he is incompetent to be executed at this time in the form of Dr. Cunningham's findings and Professor Dow's observations that Panetti is delusional and misunderstands whether and why he will be executed. *See* Sec. Mot. to Reconsider at Ex. 1 & Ex. 3. Additionally, Panetti represents that he has presented this same evidence to the state court in a renewed motion to determine his competency under Article 46.05 of the Texas Code of Criminal Procedure. *See* Sec. Mot. to Reconsider at 2 n.2.

As this Court has now explained in each of its previous orders in this case, this Court can only review the state court's decision denying Panetti's competency-to-be-executed claim to ascertain whether the decision was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Therefore, it is appropriate that Panetti

present his new evidence to the state court first because at this point, this Court is limited to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had before it at that time the state court denied that motion in December. However, because the execution is scheduled for tomorrow, the Court will stay the execution and allow the state court a reasonable period of time to consider the evidence of Panetti's current mental state and decide whether he has now "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health experts under Article 46.05. TEX. CODE. CRIM. P. Art. 46.05.

In accordance with the foregoing:

IT IS ORDERED that Petitioner's Second Motion to Reconsider [#10] is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion to Stay [his scheduled February 5, 2004] Execution is GRANTED and his execution is **STAYED for sixty (60) days** to allow the state court to reconsider his motion under Article 46.05 of the Texas Code of Criminal Procedure challenging his competency-to-be-executed in light of the evidence of Panetti's current incompetency to be submitted to this and the state court.

SIGNED this the 4th day of February 2004.

/s/ Sam Parks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**SCOTT LOUIS PANETTI,**

**Petitioner,**

**-vs-**

**DOUG DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,** **Case No. A-04-CA-042-SS**

**Respondent.**

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**ORDER**

(Filed July 20, 2004)

BE IT REMEMBERED on the 19th day of July 2004 the Court called the above-styled cause for a hearing on all pending matters and to show cause why the case should not be dismissed on mootness or ripeness grounds, and why it should not be set for an evidentiary hearing in this Court. The parties appeared through counsel. Before the Court were Respondent's Motion to Dismiss Petition [#4], Petitioner's Motion for Appointment of Counsel [#16]. Petitioner's Motion for Authorization of Funds for Expert and Investigative Assistance, Statement of the Need For Confidentiality, and Motion for Leave to File Ex Parte Application for Funds Under Seal [#17], Petitioner's Motion for Discovery [#18], Petioner's Sealed Ex Parte Motion for Authorization of Funds for Expert Assistance [#19], and Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Investigative Assistance [#20]. Having considered the motions, the arguments of counsel

at the hearing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

## Background

The petitioner, Scott Panetti, filed his second application[1] for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 26, 2004, after his execution date had been set and he had exhausted the available state court procedures, alleging he was incompetent to be executed. Panetti's attorney had filed a motion under Article 46.05 of the Texas Code of Criminal Procedure ("Article 46.05") in state court on December 9, 2003. On December 23, 2003, the state district judge, after considering the exhibits attached to the motion, denied Panetti's motion on the grounds:

> [T]he Defendant has failed to set forth alleged facts in support of the assertion that the Defendant is presently incompetent to be executed and has failed to make a substantial showing that the defendant is thus incompetent. The court further finds that the Defendant has failed to raise a substantial doubt of the defendant's competency to be executed on the basis of the said motion and attached documents, as required by Article 46.05(6), Tex. Code Crim. Proc.

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[1] Panetti filed his first federal habeas petition in 1999, in which he alleged fourteen grounds for relief, including claims that he was incompetent to waive counsel and incompetent to stand trial, but not that he was incompetent to be executed. *See Panetti v. Johnson*, Cause No. A:99-CA-260-SS (W.D. Tex. Mar. 9, 2001). This Court's opinion was affirmed on appeal. *See Panetti v. Cockrell*, No. 01-50347, slip. op. at 6-8 (5th Cir. Jun. 19, 2003).

Panetti filed a motion for stay of execution in this Court in conjunction with his habeas application, arguing this finding is a decision contrary to clearly established Supreme Court precedent, and specifically, *Ford v. Wainright*, 477 U.S. 399 (1966). The issue before this Court in deciding that initial motion to stay was whether reasonable jurists could disagree regarding whether the state court's decision that Panetti had not made a substantial showing of incompetency that would warrant evaluation of two mental health experts was an unreasonable application of *Ford* and its progeny. Initially, however, Panetti and his attorney had failed to include with their motion to stay or federal habeas application the Article 46.05 motion filed in the state court or any evidence of the Panetti's current mental status. Counsel for Panetti did submit a copy of the Article 46.05 application with his first motion for reconsideration. Eventually, along with a second motion for reconsideration, Panetti presented evidence to support his contention that he is incompetent to be executed at that time in the form of Dr. Cunningham's findings and Professor Dow's observations that Panetti is delusional and misunderstands whether and why he will be executed. Panetti told the Court that he had presented this same evidence to the state court in a renewed motion to determine his competency under Article 46.05. Therefore, the Court held it appropriate that Panetti present his new evidence to the state court first because at that point, the Court was limited by AEDPA to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had before it at that time the slate court denied that motion in December 2003. However, because the execution was scheduled for the following day, February 5, 2004, the Court stayed the execution for 60 days to allow the state court a reasonable

period of time to consider the evidence of Panetti's current mental state and decide whether he has now "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health expects under Article 46.05. TEX. CODE CRIM. P. Art. 46.05.

After the Court's February 4, 2004 Order, the state court judge, Judge Ables, asked the parties to recommend mental health experts. On February 19, 2004, Panetti's counsel filed ten motions in state court, asking for several things including that counsel be appointed, funds to hire experts, discovery, and that the state refrain from setting a new execution date, among other requests. On February 20, 2004, Panetti's lawyer gave Judge Ables a mental health expert's name. However, the trial judge had decided to use two mental health experts he selected instead of those recommended by the parties. On February 23, 2004, Judge Ables entered an order citing Article 46.05(f) appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. Counsel for Panetti contends that by appointing those experts, Judge Ables implicitly found Panetti had made "a substantial showing of incompetency" with the documentary evidence he had submitted. On April 28, 2004, the appointed experts filed their joint report concluding Panetti was competent to be executed. Counsel for Panetti was then order [sic] to raise any other matters regarding competency by May 21, 2004. On May 21, 2004, Panetti filed objections to the methods and conclusions of the experts and renewed his motions to appoint counsel, hire a mental health expert, and to hire an investigator. He also asked the trial court to hold an evidentiary hearing, which

counsel for Panetti maintains is required by the plain language of Article 46.05. On May 26, 2004, Judge Ables entered a short order in which he stated he had appointed two experts pursuant to Article 46.05 and that it "appears from the doctors' reports that the Defendant, Scott Louis Panetti, understands that he is to be executed; that the execution is imminent, and that the Defendant understands the reasons he is being executed." Respondent's Opp. to Mot. for Funds, Ex. A (May 26, 2004 Ables Order). Thus, concluded Judge Ables, "[b]ased on the aforesaid doctors' reports, the Court finds the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*

At approximately the same time Judge Ables issued his order denying Panetti's motion under Article 46.05, this Court entered a show cause order instructing Panetti to show cause why his case should not be dismissed as moot. Panetti responded by filing motions for appointment of counsel, for authorization of funds for expert and investigative assistance, and for discovery. The Court set the case for hearing on these motions, as well as the motion to dismiss filed in January by the Respondent, and so that the parties could present their arguments regarding whether Panetti's *Ford* claim faced any mootness or ripeness problems in light of the fact there is currently no pending execution date.

## Analysis

### I. Preliminary Issues: Ripeness and Successive Petitions

At the time he filed it, Panetti's petition was definitely ripe for review as he was facing a February 5, 2004 execution. *See Stewart v. Martinez-Villareal,* 523 U.S. 637, 643

(1998) (declaring a petitioner's *Ford* claim "unquestionably ripe" once the state supreme court issued a warrant for his execution). Then this Court stayed the execution for 60 days so that the state court could consider the evidence of Panetti's competency to be executed presented to this Court in conjunction with his motions to stay. The state court did review the evidence and ultimately denied Panetti's Article 46.05 motion. However, the district attorney has not yet filed his motion to secure a new execution date. The parties at the hearing represent that both consider Panetti's execution imminent – the district attorney is simply refraining from requesting a date until these proceedings are concluded so the Court is not again faced with emergency motions to stay. An imminent execution is the prerequisite to a ripe *Ford* claim. *Id.* at 644-45 (stating a petitioner's competency to be executed cannot be determined until his execution is imminent). The parties agree Panetti's execution is indeed imminent and therefore the Court holds Panetti's *Ford* claim is ripe for review.

Respondent contends this Court should dismiss this petition as successive or transfer it to the Fifth Circuit so that Panetti can secure the leave of the Fifth Circuit to pursue his successive petition. On April 24, 1996, significant amendments were made to the habeas corpus statute by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(b) was amended to provide that before a second or successive application for writ of habeas corpus is filed in the district court, an applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. § 2244(b)(3).

AEDPA's limitations on successive applications for writs of habeas corpus present a thorny problem for petitioners with *Ford* claims in light of *Martinez-Villareal*. On the one hand, under *Martinez-Villareal*, a *Ford* claim is not ripe until the petitioner's execution is set, or at least imminent. Therefore, it would be futile to raise the *Ford* claim in a initial application for federal habeas relief because it would inevitably be dismissed as premature. *See Martinez-Villareal,* 523 U.S. at 644-45 (acknowledging the propriety of dismissing a *Ford* claim as premature prior to the scheduling of the execution); *see also In re Davis,* 121 F.3d 952, 953 (5th Cir. 1997) (explaining in the procedural history "Our court denied the motion without prejudice as premature, because Davis' execution had not been scheduled."). On the other hand, if a petitioner does not raise a *Ford* claim in his initial petition, and instead waits until it is ripe (i.e., his execution date is set), pursues the available state remedies under Article 46.05, and then seeks federal habeas review, he faces potential dismissal of his petition under AEDPA since the claim was not presented in an earlier petition and is based on neither a new rule of constitutional law (*Ford* was decided in 1986) nor a factual predicate that could not have been discovered based on the exercise of due diligence (Panetti's history of mental illness predates his first habeas petition). *See* 28 U.S.C. § 2244(b)(2). It is, however, based on a factual predicate that did not exist at the time he filed his first petition – the setting of his execution date.

The Fifth Circuit in *Davis,* prior to *Martinez-Villareal,* applied § 2244(b)(2) to a situation like this one, where the petitioner did not raise a *Ford* claim in his first petition but did raise it in a successive petition once his execution date had been set. Acting without the Supreme Court's

guidance in *Martinez-Villareal* that a *Ford* claim is not ripe until an execution is imminent, the Fifth Circuit concluded § 2244(b)(2)(A) did not apply to the petitioner's claim because the legal basis of his claim had been available since the year *Ford* was decided (1986) and it was only the factual basis that was not available. *Davis,* 121 F.3d at 956. The Fifth Circuit also declined to create an equitable exception to § 2244(b) for those petitioners who present their *Ford* claims at the first available opportunity *(i.e.,* once his execution date was set) even though the appellate court was willing to accept that the petitioner was not abusing the writ since he was acting at the first available opportunity. *Id.* Finally, the Fifth Circuit rejected the petitioner's argument § 2244(b) is unconstitutional in the context of *Ford* claims since it precludes consideration by a federal court of a mature *Ford* claim presented for the first time on the gounds federal court review can be obtained through United States Supreme Court review of state court competency proceedings or by the petitioner's filing an original habeas application to the United States Supreme Court. *Id.* (citing U.S. CONST. Art. I, § 9, cl.2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in Cases of Rebellion or Invasion the public Safety may require it")).

The Fifth Circuit acknowledged "the uneasy fit" of *Ford* claims and successive writs post *Martinez-Villareal* in *Richardson v. Johnson,* 256 F.3d 257 (5th Cir. 2001) but explicitly avoided the question presented in this case. In *Richardson,* the petitioner, like Panetti, raised his *Ford* claim for the first time in a second petition once his execution date was set. *Id.* at 258. The district court denied relief but granted his application for certificate of appealability on the

question of whether *Martinez-Villareal* overruled *Davis*. In *Richardson*, the Fifth Circuit made clear that there was no question the petitioner was pursuing a successive writ. *Id.* However, the Circuit noted that the question of whether a *Ford* claim is subject to the limits of a successive writ is a "distinct question." and also noted the supreme court in *Martinez-Villareal* explicitly declined to decide the case of a petitioner who did not present his *Ford* claim in his first federal habeas (because petitioner Martinez-Villareal had). *Id.* at 258-59. Thus, the Circuit framed the issue this way:

> This leaves the argument that Richardson did not have a *Ford* claim at the time he filed his first federal habeas, a contention with two aspects. The first is that the factual basis for the *Ford* claim could not have been discovered at the time of the first federal habeas. That claim is refuted by the assertion he has long suffered this bipolar disorder and by his own expert witness.
>
> The second aspect is that the *Ford* claim was not ripe when the first federal habeas petition was filed for the reason that the execution was not then imminent. To accept this argument would mean as a practical matter that no *Ford* claim would need to be presented in a first filed habeas, given that the state courts, in part at our urging, now seldom set execution dates until after the first round of appeals and habeas.

*Id.* at 259. The Fifth Circuit then concluded it "need not wrestle" with the issue of whether an unripe *Ford* claim needs to be presented in a first filed habeas petition because in *Richardson*, it was clear based on the findings of fact of the state courts that his *Ford* claim had no merit. *Id.* In spite of avoiding this significant question, however, the Fifth Circuit nevertheless held that while "*Ford* claims

admittedly have an uneasy fit with AEDPA's limits upon successive writs," that fit was examined in *Davis* and *Davis* remains "sound and binding." *Id.*

This Court is thus in a difficult position because in the Fifth Circuit in *Richardson* avoided the exact question presented in this case and without explanation, held *Davis* remains good law even though in light of *Martinez-Villareal,* Panetti's *Ford* claim was clearly not ripe until his execution date was set. To further complicate matters, the Texas appellate courts have abdicated all responsibility with regard to *Ford* claims. In *Ex Parte Caldwell,* 58 S.W.3d 127, 330 (Tex. Crim. App. 2000), the Texas Court of Criminal Appeals held Article 46.05 "provides that jurisdiction of the motion remains in the trial court and permits the Court of Criminal Appeals to review only a finding of incompetence. Under the statute, we have no other role in the process." The impact of *Ex Parte Caldwell,* besides the obvious problem that Article 46.05 will never be subject to clarification by the appellate courts of Texas, is a petitioner seeking relief through Article 46.05 cannot appeal a state court's denial of his *Ford* claim to the United States Supreme Court even on federal constitutional grounds, since the Texas Court of Criminal Appeals cut off his right to appellate review to the Texas appellate courts on a purely state law basis. This in turn undermines the rationale of *Davis,* which in part concluded that § 2244(b) was not unconstitutional as applied to *Ford* claims because "federal court determination of the issue can be sought through Supreme Court review of the state court competency proceedings." *Davis,* 121 F.3d at 956. In Texas this is clearly not the case.

Thus, if Panetti cannot bring his *Ford* claim in an initial petition because it is not ripe, and cannot bring it in

a second petition once his execution date is set under § 2244(b) and the rationale of *Davis*, then he cannot secure federal review of his *Ford* claim at all in Texas except to filed [sic] an original habeas application in the United States Supreme Court. The Fifth Circuit in *Richardson* recognized even after *Davis* that it may be that petitioners such as Panetti do not have ripe *Ford* claim when they file their first federal habeas petitions and therefore as a practical matter, no *Ford* claim needs to be presented in a first filed habeas. *Richardson*, 256 F.3d at 259. Although the Fifth Circuit avoided "wrestling" with this question, this Court, squarely presented with it, cannot. Therefore, in light of the fact the rationale of *Davis* is called into question by the combination of the Supreme Court's decision *Martinez-Villareal* and the Texas Court of Criminal Appeals' decision in *Ex Parte Caldwell*, and the question left often by the Fifth Circuit in *Richardson*, the Court concludes Panetti had no *Ford* claim until his execution date was set. Therefore, it would have been futile to require him to assert it in his first petition, and the ripe claim is now properly before this Court. Accordingly, the Respondent's motion to dismiss this petition as successive is denied.

## II. The State Court Decision

The Court now turns to the merits of Panetti's *Ford* claim.[2] Of course, this Court can only grant Panetti's petition if the state trial judge's decision that he competent to be executed is (1) "contrary to, or involved an

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[2] This claim is exhausted because under *Ex parte Caldwell*, discussed above, Panetti has no right to appeal the trial judge's denial of his Article 46.05 motion in the state courts. *See Patterson v. Dretke*, 370 F.3d 480, 483 (5th Cir. 2004).

unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied*, 520 U.S. 1195 (1997).

As the Court explained its prevision Orders in this case, in *Ford,* the Supreme Court in a plurality opinion declared the execution of the insane a violation of the Eighth Amendment prohibition of cruel and unusual punishment. 477 U.S. at 409-410. According to the Fifth Circuit's interpretation of *Ford*, a state does not run afoul of the Eighth Amendment if it ensures "that a person know the fact of his impending execution and the reason for it," *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995). In 1999, Texas enacted Article 46.05, which codifies this definition of insanity and sets forth the procedures by which the state courts should evaluate a petitioner's competency-to-be-executed claim. *See* TEX. CODE CRIM. PROC. Art. 46.05. In relevant part, Article 46.05 directs the state court:

> (d) On receipt of a motion filed under this article, the trial court shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:
>
> > (1) the motion, any attached documents, and any responsive pleadings; and
> >
> > (2) if applicable, the presumption of competency under Subsection (e).

(e) If a defendant is determined to have previously filed a motion under this article, and has previously been determined to be competent to be executed, the previous adjudication creates a presumption of competency and the defendant is not entitled to a hearing on the subsequent motion filed under this article, unless the defendant makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed at the time of filing the subsequent motion under this article.

(f) If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed.

(g) If the trial court does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion.

(h) A defendant is incompetent to be executed if the defendant does not understand:

(1) that he or she is to be executed and that the execution is imminent; and

(2) the reason he or she is being executed.

(i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

> (j) By filing a motion under this article, the defendant waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the defendant is incompetent to be executed.
>
> (k) If, on the basis of reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing, the trial court makes a finding by a preponderance of the evidence that the defendant is incompetent to be executed, the clerk shall send immediately to the court of criminal appeals in accordance with Section S(d), Article 11.071, the appropriate documents for that court's determination of whether any existing execution date should be withdrawn and a stay of execution issued. If a stay of execution is issued by the court of criminal appeals, the trial court periodically shall order that the defendant be reexamined by mental health experts to determine whether the defendant is no longer incompetent to be executed.
>
> (l) If the trial count does not make the finding as described by Subsection (k), the court may set an execution date as otherwise provided by law.

*Id.* The Fifth Circuit has declared these procedures in compliance with the mandates of *Ford* and therefore constitutional on their face. *Caldwell v. Johnson,* 226 F.3d 367, 374 (5th Cir. 2000). Therefore, had Judge Ables followed Article 46.05, the reasonableness of his legal conclusions would be insulated from attack on habeas review since it would be impossible for this Court to hold they were "contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Count of the United States." 28 U.S.C. § 2254(d).

However, in this case, Judge Ables deviated from the parameters of Article 46.05. On February 23, 2004, he entered an order citing Article 46.05(f) appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. By citing Article 46.05(f) and appointing the two experts, Judge Ables implicitly found Panetti had made "a substantial showing of incompetency."[3] TEX. CODE CRIM. PROC. art. 46.05(f). Thus, under the plain language of Article 46.05(k), he was then required to consider the mental health experts' reports, Panetti's motion, attached documents, responsive pleadings, and "any evidence introduced in the final competency hearing" before making a determination based on the preponderance of the evidence whether Panetti was competent to be executed. TEX. CODE CRIM. PROC. art. 46.05(k). However, Judge Ables did not hold a "final competency hearing" and therefore did not consider any responsive evidence Panetti might have presented. As such, he did not comply with Article 46.05.

That Judge Ables did not comply with Article 46.05 does not automatically mean Panetti is entitled to relief on his *Ford* claim. It simply means that Judge Ables' conclusion is taken out of the safe harbor created by the Fifth

[3] As the Court explained in detail its previous Orders in this case, states are allowed under *Ford* to require an initial documentary demonstration of incompetency before ordering an [sic] mental health evaluation. With regard to Panetti's most recent Article 46.05 motion, however, Judge Ables implicitly found Panetti met this threshold burden.

Circuit in *Caldwell v. Johnson* that insulates state proceedings conducted in compliance with Article 46.05 from habeas attacks on the grounds they fall short of what *Ford* requires. The next question for this Court is whether what the state trial judge did in this case, albeit inconsistent with what Texas law requires, nevertheless complied with the minimal requirements of *Ford*. *Ford* itself involved a situation where the state (albeit the governor, not a trial court), appointed mental health experts to evaluate the petitioner's competency to be executed. Justice Powell in his critical and decisive concurrence concluded Florida's procedures did not comport with the Constitution's guarantee of due process. Justice Powell emphasized the Florida procedures did not afford the petitioner the "opportunity to be heard" because the Florida statute did not require the governor to consider materials submitted by the prisoner. *Ford*, 477 U.S. at 424. Therefore, concluded Justice Powell:

> [T]he determination of the petitioner's sanity appears to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process. It follows that the State's procedure was not "fair," and that the District Court on remand must consider the question of petitioner's competency to be executed.

*Id.* at 424-425. Justice Powell went on to opine that due process would not require a full-blown trial or anything close. As long as the state provided an impartial entity to "receive evidence and argument from the prisoner's

counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," it would be affording the petitioner due process. *Id.* at 427. In this case, however, it was exactly this ability to present his own evidence and refute the state-appointed psychiatrists' opinions that Panetti was denied. Had the trial court complied with Article 46.05 and afforded Panetti a final evidentiary hearing, it would have complied with the mandates of *Ford* as well. However, in falling short of the mandates of Article 46.05, Judge Ables fell short of the mandates of *Ford* as well.

Thus, the Court will hold an evidentiary hearing at which Panetti can introduce his own evidence and attempt to rebut the state court-appointed experts' conclusions that he is competent to be executed. In order to ensure his ability to adequately present his claim, the Court will appoint counsel[4] and afford him the funds to obtain investigative and expert assistance. Additionally, the Court will in a separate order address Panetti's motion for discovery.

In accordance with the foregoing:

IT IS ORDERED that Respondent's Motion to Dismiss Petition [#4] is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Appointment of Counsel [#16] is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Authorization of Funds for Expert and

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[4] The Fifth Circuit recently upheld in the validity of appointing counsel to assist in the investigation of a claim that the petitioner could not have raised in an earlier petition. *See In re: Hearn*, ___ F.3d ___, 2004 WL 1497522 (5th Cir. Jul. 6, 2004).

Investigative Assistance and Motion for Leave to File Ex Parte Application for Funds Under Seal [#17] are GRANTED.

IT IS FURTHER ORDERED that Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Expert Assistance [#19] is GRANTED and Defendant is authorized to retain an expert at the maximum rate of $100 per hour. Defendant may incur up to $1000 of expert services from his expert. If Defendant believes he needs more than $1000 worth of expert services, he must file a motion justifying the same and detailing the expected expense. Defendant is ordered to obtain and file with the Court an itemized accounting from the expert of what services he provided and the amount of time he expended.

IT IS FURTHER ORDERED that Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Investigative Assistance [#20] is GRANTED and Defendant is authorized to retain an investigator at the maximum rate of $50/hour. Defendant may incur $1000 in investigatory services. If Defendant believes he needs more investigation after incurring the expense of $1000, he must file a motion with this Court justifying the same and detailing the expected expense. Defendant is ordered to obtain and file with the Court an itemized accounting from the investigator of what he investigated and the amount of time spent.

IT IS FINALLY ORDERED that this case is SET for EVIDENTIARY HEARING on August 23, 2004 at 9:30 00 a.m. in Courtroom No. 2, United States Courthouse, 200 West Eighth Street, Austin, Texas.

SIGNED this the 20th day of July 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| SCOTT LOUIS PANETTI | ) | Docket NO. A 04-CA-042 SS |
| | ) | |
| vs. | ) | Austin, Texas |
| | ) | |
| DOUG DRETKE | ) | September 7, 2004 |

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE SAM SPARKS
Volume 1

(Filed Nov. 15, 2004)

[5] MARY ALICE CONROY, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Where are you employed?

A. I'm a professor in the Department of Psychology at Sam Houston State University.

Q. And what is your position?

A. I am a professor and I'm also director of practicum training for the forensic clinical psychology doctorate program, and I'm director of in-clinic training.

THE COURT: Excuse me. What school?

THE WITNESS: Sam Houston State University.

* * *

[12] Q. All right. I want to ask you now about Scott Panetti. Did you interview him last August 26th?

A. That's correct. I did.

Q. What was his demeanor towards you at the time?

A. His demeanor was polite and cooperative, but quite suspicious. As the interview began, I gave him a statement of disclosure, which I always do. I go over it with him. He was very suspicious of that. He didn't want to sign it. He gave it back to me but said he would talk, anyway.

And as the interview progressed, he occasionally challenged my motives. For example, he suddenly asked me if I'd attended the prison rodeo in Huntsville, and I said no. And he said, well, then, you're probably biased against me because if you don't understand using working animals for important purposes, you're not in my corner. And then, he went on to talk about rodeo work, and we even got off that topic.

As the interview ended – and he ended it rather abruptly – as he was walking out of the room with the assistant warden, he turned around and said, I don't understand, are you a friend or foe? And I said, pardon me? And he said, are you friend or foe? And, of course, I'd already given him the disclosure with the fact that you had requested my appointment from the federal court.

[13] So I went over that again, and he said, well, I don't know if you work for the darkness or the light.

Q. The darkness or the light?

A. The darkness or the light.

Q. Okay. Did he ask you about you being a Christian?

A. He did.

Q. How did you handle that?

A. I just said, well, Mr. Panetti, I believe many things, as most people do, but I'm interested in hearing what you believe.

Q. Okay. Did that get him somewhat back on track or was he still –

A. He went off in another direction. He didn't challenge my Christianity.

Q. Did he terminate the interview?

A. Yes. The first one, yes.

Q. Is it important to – about how long did you spend with him, would you estimate, the first visit?

A. The first visit was about an hour and 25 minutes, and things at that point seemed to be going all right. And then, suddenly, he waved to the officer and looked at me and said, can I go now? And that was the end of that.

Q. Is it important to spend time with someone like Mr. Panetti?

A. I think it's particularly important to spend time with Mr. [14] Panetti and to listen not only to the content of what he says but how he says it, the order in which he says it, the way in which he puts ideas together.

Q. Okay. And the longer – why is it important to spend an extended period of time, rather than a short

period of time, when you're doing an evaluation of someone like this?

A. Well, this particular type of person – and we'll probably get into this later – I believe to have a severe thought disorder, and that means that his thinking does not fit together in any kind of logical, rational way, and that's something that's very difficult to mock or to copy.

But what you do as an evaluator if you want to see, you know, this really serious thought disorder, or was it something else, you listen to them for a long period of time and you let them talk, and you see if they, in fact, repeat themselves, or if they come up with memorized things, or if this is something that they're – that they've said before. When they run out of steam – and many times, they actually start talking in an irrational manner by about half an hour.

And so, that's why I thought it was very important to let Mr. Panetti talk for a full hour and 20 minutes the first time I saw him.

Q. Okay. And where did you interview him?

A. I interviewed him in a special contact visiting room, off the visiting area at the Polunsky Unit.

[15] Q. Okay. And what did you understand the purpose of your visit to be there?

A. My understanding was I needed to look at the elements of competence for execution as they applied to Mr. Panetti.

Q. Okay. What records did you review in connection with your evaluation of him?

A. All right. Do you mind if I refer to my notes for that?

Q. Not at all.

A. Anyone's welcome to unless –

Q. I know it's voluminous.

A. Ended up actually having rather voluminous records on this person to review. I reviewed all of his TDCJ records. And he'd been in TDCJ since 1995. Reviewed the Bell County jail records; reviewed his general Navy records, and then, the Naval Regional Medical Center records. And then, medical records – I had records from Veterans Administration Medical Centers in Kerrville, Waco and Tomah, Wisconsin; and then, some from Cumberland Memorial Hospital, and from Northern Pines Unified Services Center; and a commitment record which was a legal paper from 1990.

And then, in terms of doctors' reports, I reviewed reports by Dr. Lee Simes, Dr. Mary Anderson, Dr. George Parker, Dr. Mark Cunningham, Dr. Michael Arambula, Dr. F.E. Seale, Dr. Wolfgang Selck. And then, it wasn't a report, but it was a transcript of testimony of Dr. Richard Coons. And [16] then, there were two attorney statements. I believe one –

Q. Dr. Coons, was that from the 1994 competency trial?

A. Yes, that was.

Q. Okay. Go ahead. I'm sorry.

A. Attorney statements was one by David Dow from University of Houston and another from a Scott Monroe.

And then, there was a statement by Sonja Panetti, and an affidavit by Jane Panetti, both of whom had been spouses of Mr. Panetti. Two other statements that were included was one by a Jessica McBride, and one by a Victoria Panetti, who was apparently a sister.

There were transcripts. There was a – I think a pretty complete transcript of the competence trial in September of 1994. And then, there were excerpts from the trial competence – the trial – the actual trial. And then, there were voluminous various writings, drawings and envelopes by Mr. Panetti.

Q. Okay. Did you – did the review of the psychiatric records – did you review records that were made before 1992?

A. Yes.

Q. Through the '80s?

A. Yes.

Q. Okay. Why are records which predate the events important?

A. Well, records in general are important because in order to make an accurate diagnosis, even a clinical one, what you need [17] is the history of the person and what their mental health problems have been over the years. But particularly, if you're doing a forensic evaluation, it becomes important to see if the psychopathology that you seem to be observing actually predates the crime, or if it's something acquired at the time of the crime or acquired thereafter. And from the early pre-crime days, if symptomatology is consistent with what you're seeing today.

Q. Does it also play into determination of someone who's malingering their mental illness?

A. Yes, it does, because, again, you're looking for consistency and you're looking for something that predates the time when they had any motive to malinger.

Q. Okay. Who have you spoken to in connection with your evaluation of him?

A. Okay. I've spoken with a Karin Eberhart, who is a pen pal and long-time visitor/friend. I've spoken with Yvonne Panetti, who is the defendant's mother. I also spoke with several people at TDCJ, one was a Victoria Williams, who's an officer in the visiting room. Another was a Sheila Ford, who's an officer in the visiting room. And then, on the first day that I was there, I spoke, very briefly, with another Ms. Williams in the visiting room whose first name I didn't even manage to get.

Q. She's a different Ms. Williams –

[18] A. They're two different people.

Q. – than Victoria Williams?

A. Yes.

Q. Okay. And Karin Eberhart is the pen pal and visitor from Switzerland?

A. That's correct.

Q. Have you examined people diagnosed with schizophrenia before?

A. Yes. Probably the major portion of our population in our inpatient units in federal Bureau of Prisons hospitals are diagnosed with some form of schizophrenia.

Q. What are the symptoms generally of schizophrenia?

A. Schizophrenia can look different in different individuals, but in general the symptoms would be you have what we call positive symptoms, and that would be things like hallucinations, and what that means is you see, hear or feel things that aren't really there. Hearing voices is commonly one of the symptoms.

You could also have what are called delusional beliefs. And a delusional belief is a belief that's patently false and that can be demonstrated to be false, but you cling to it, regardless if you have schizophrenia.

You can also have a thought disorder which means that your speech can become garbled, you can show confusion, it can be disorganized. You can put forth a stream of ideas that are [19] only very loosely, if at all, related to each other. It's just a general lack of logic in your thinking.

And then, you can also have in a case of schizoaffective disorder, which I, by the way, believe Mr. Panetti has, certain mood symptoms, either, you know, very hyperactive, very up moods, or very depressed and down moods.

Q. Do you need some water there?

A. Yes.

Q. I think that's – I think that's got water in it. I didn't check, but I assume so.

A. Whatever it is will work.

And then, there are negative symptoms. A negative symptom of schizophrenia are things like flat affect, or inappropriate affect, which means people laugh at times when nothing is funny.

Q. Okay. You also – you've just said, too, that schizophrenia can express itself differently in different persons. Can schizophrenia also fluctuate in the person?

A. Oh, it definitely fluctuates in the person. There are times when people are in what we call spontaneous remission and can seem perfectly fine for a period of time, and then, there are other times when they can be acutely psychotic. They may have episodes, they may have them frequently, they may have them less frequently. Medication, for example, can help with the schizophrenia.

[20] Q. Can people who are unfamiliar with what you've just said about schizophrenia mis-perceive the disease in a person and think that they don't have it?

A. Oh, yes. In fact, when I was with the Federal Bureau of Prisons, one of the things I did was plan training seminars for people who worked in corrections simply because, typically, when they first came to work at the mental health unit, they would see these people simply as either acting out, or being uncooperative, or being silly.

Q. Okay. What was your overall impression of Mr. Panetti?

A. My overall impression of Mr. Panetti is that he has a serious psychotic disorder, most likely from the symptoms both in the chart and that he exhibited to me as schizo-affective disorder.

Q. And did you think he had schizophrenia?

A. Yes, that's a form of schizophrenia.

Q. I understand. Okay. Did you see him again?

A. Yes. I saw him again the following Monday.

Q. Okay. Would he see you?

A. Well, initially he was apparently a little reluctant, but the assistant warden agreed to go up and talk to him to see if he could talk him into seeing me. And apparently, they later came back down and said, well, he is not sure, but he will see you if this evaluation is court-ordered, and I said, yes, it was. And that was when he came down.

[21] Q. And the warden was Warden Jones?

A. Yes. That's correct.

Q. Okay. Did he express a fear to you that he was being monitored in that second interview?

A. Yes. He told me, right away, that the room was bugged, and he just wanted me to know that he couldn't give a complete interview because the room was bugged; and furthermore, that anything going on in the room next door, which was another attorney visit booth, they would be able to hear him.

Q. At one point, did he hear a remark about a beer can?

A. Yes. He said that didn't I remember from the time before the beer can popping next door.

Q. And was there any beer can popping next door that you recall?

A. I don't recall any can popping. I can't imagine there would have been a beer can.

Q. Okay. You were in the prison unit, right?

A. Yes.

Q. Okay. Were you able to follow his train of thought in that second interview?

A. You could follow him sometimes and sometimes you couldn't.

Q. Well, what were the problems that you encountered with him in that regard?

A. Well, he has symptoms which are often referred to as flight of ideas and loose associations, and that is he talks [22] rapidly, in a rather pressured manner, but he goes on from topic to topic, and often you can't see the relationship between those topics or where he's going with that.

Q. All right. I'm going to ask you for some examples in a minute, but let me ask you, too: How was his demeanor through that, that is, what did he look like and what did he do physically?

A. Physically, he was fairly still. He had a steady, intense stare most of the time, looking at me. The majority of the time is what we call his affect was quite flat. In other words, his face was rather expressionless. However, a few times, suddenly he would smile at a time when I would be thinking, what's this about? I don't know what this smile is in reference to, and it hinted to me what I called inappropriate affect.

Q. Okay. Did he sing? Did he break out in song at any point?

A. Just once. He sang me one hymn.

Q. He sang you a hymn?

A. Uh-huh.

Q. Okay. And did he preach to you?

A. Yes.

Q. And that is, he's not having a conversation, I mean, he's trying to convince you of some religious belief, right?

A. Well, he explained to me, that although I may think that I [23] was there to perform a professional service and he hoped sincerely that I was well paid for that service, that that was actually incorrect, that God had sent me there to hear his word.

Q. For you to hear his word?

A. Yes. Meaning God's word through him.

Q. Through him. Right.

Okay. In your opinion, does Mr. Panetti know that he is on death row?

A. I believe he does, yes.

Q. Do you believe that he is aware that the state intends to kill him?

A. I believe he's aware of that, yes.

Q. What did he say about that? What was your – what's your basis for that conclusion?

A. Well, he said several things. He said that – well, first of all, in the chart, in the TDCJ records he has said that the state intends to kill him. He said to me that there is no treatment here. The only reason people are her is to be killed. And then, he talked about executions in general, his own and other people's.

In fact, there was an execution the Thursday night that I was actually there, and the person had been taken out – they call it a walk-by – for execution, and he knew this man, and he spoke with me about that and asked me if I knew [24] it. And I actually wasn't sure, Monday morning, if this person had been executed or not, or if he got a stay, because he knew if you come back, you get a stay. If you don't come back, then you don't, and you're in one of two places, as he explained it to me: you're either with the Lord in the light, or you're in a place so terrible you don't even want to think about it.

And so, he asked me and he also asked Warden Jones, who informed him that, yes, this person had been executed. And he looked sad for a moment, and he said, well, I'll pray that he's at peace with the Lord.

Q. Okay. What did he tell you about his understanding of his killings of his in-laws?

A. He would say almost nothing about that. And let me preface this by saying that he doesn't make these points, point number one, point number two, point number three. These are statements that I'm kind of pulling out of his very garbled speech. When I asked him about the killing of his parents, he said, at one point, well, you have to understand, I'm not in denial, but it would be a sin to talk about the past. And then, he seemed to be saying that God had nullified it, God had forgiven him, God had wiped

the slate clean. In fact, he uses the phrase "wiped the slate clean," and it would be actually sinful to talk about that because it's no longer an issue; it's over.

[25] Q. What did he tell you regarding his understanding about why he is to be executed?

A. His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the state wants to kill him is not what they're saying.

He says granted he understands that the state is saying that they wish to execute him for this murder, he knows that, but that that's really a sham, that that's not why the state wants to execute him. The state wants to execute him to stop him from preaching.

Q. When did he say that – he believes he's sort of under attack by supernatural demonic anti-forces?

A. Yes.

Q. Is that right? When does he believe – or when did he tell you that these forces first manifested themselves to him?

A. Well, he said – and the record confirms this – that these forces manifested in him in the middle '80s, when he believed that demons were possessing his house, and his furniture, and his possessions, and they were around him and causing him grief. And then, he talks about when he was in jail prior to his trial and he says – and this was really [26] hard to follow, so I hope I'm being fair to him.

He says that there was a diabolical sheriff who took him to a strange old doctor, and then, somehow that doctor did strange things with his medicine. And I didn't quite understand what it was and tried to clarify that. But then, he jumped on and said, and then, they wanted to shoot me. They tried to have me shot before the trial ever started.

Q. When you referenced, just a moment ago, about his demonic forces in the '80s, about the furniture, are you talking about the incident where he believed that the furniture was possessed by demons and he buried his furniture?

A. I talked about that incident is in the medical records. And I'm also talking about the statements by his then wife Jane Panetti, that he believed there were devils in the house and that he was seeing them on the walls, and that he was slashing them to get their blood out. And then, also, Mr. Panetti told me, while I was interviewing him, that he had to jab a knife into the ground to kill the demons on the ground.

Q. How long did you spend with him on that second interview?

A. Started about ten after 10:00, and I think it ended about a quarter to 12:00.

Q. Okay. In your opinion, does he perceive or appreciate the connection between his killing of his in-laws and his execution?

A. No. I think he thinks it's really part of spiritual [27] warfare, and that's what he has told other people. That's what he's told me.

Q. Do you believe he was malingering?

A. No.

Q. How do you rule that out?

A. Well, with this particular individual, what he was manifesting, if I could use that word, was severe thought disorder, and that means jumping from topic to topic in a totally illogical way. Now, in my 27 years of experience in practice, that is probably one of the most difficult things for anybody to malinger. It's easier to tell you that they have strange ideas, that they're hearing voices. But to actually mimic psychotic loose associations, not only to mimic it but to mimic it for more than an hour on end, is almost impossible.

Q. What is clanging?

A. Clanging means that you take a piece of a word – sometimes it's rhyming or just a piece of a word that makes no sense, and you repeat it.

Q. Did he exhibit clanging at any point with you?

A. Just once.

Q. Can you tell the Court, if you've got your notes, about that?

A. Well, this one I remember. Actually, it's worded. He was talking again about God and the holy spirit, and he said the [28] holy spirit, the holy spirit is a paraclete. Paraclete, parachute, paramedic.

Q. Okay. Can you give us some examples of his train of thought? You've described to the Court that you're pulling this – your information out, after sitting and listening to him for some period of time, but this isn't a

question-and-answer form. You're listening and he's just talking indefinitely; is that fair?

A. Well, put it this way. I attempted, particularly during the second interview, to do a question-and-answer form. His answers to my questions were often very long, marginally relevant, if at all. And I can give you a couple of examples, if I can look at my notes.

Q. You can. And there's nothing – is there anything unusual or surprising that you get unresponsive answers from someone suffering from schizophrenia?

A. No.

Q. Okay.

A. Okay. And I will say I don't have this word-for-word because Mr. Panetti spoke in very rapid speech, so it was almost impossible to take it down. And as most people would give you an opportunity to stop and take notes, he doesn't. He talks right over your notes and goes on with it, so it's difficult to get it. But I think this gives you an example of his train of thought.

[29] I asked him about a Sergeant Iron Horse, who is someone that, supposedly, he believed existed somewhere in his past but wasn't real. And so, he said, well, I thought there was a Sergeant Iron Horse when I was insane, but then, there was the Navy. I went to the Navy and you could be called sergeant in the Navy and that's where that came from, but no, it's not in the Navy because in the Navy, there aren't sergeants. But then, we buried Marvin, and we buried Marvin in the offshore in that accident. You know that his dad was a warrant officer. But you know you can make $30 a day as a cowboy, but your family needs more. You know, I like riding jobs.

Q. Okay.

A. And then, this next one that I marked is just a better example of what I call loose associations, which means putting things together where you can sort of see a theme, but it doesn't make a lot of sense. He was talking about shaving equipment, and then, all of a sudden, he began talking about Darwinism and creationism. And I then, at one point, said, what do you mean? And he said, I mean, I go to the mountain tops. I went to the mountain tops in Montana. There are pretty mountain tops in Montana. But then, you have to understand that Naval technology is sophisticated.

And then, he went on to talk about Russian technology being more sophisticated. And did I know about John Ballard [30] and the Titanic. Was I aware of what might be at the bottom of the Black Sea. It might be Noah's Ark. Noah's Ark is very big. You know it's the size of the U.S.S. Reagan because it has to be in order to hold the dinosaurs. You know, the government of Malta tried to hide that history, but the New York judges wouldn't let them.

Q. But the New York judges wouldn't let them?

A. Again, this can go on and on and on, much more than I could ever take down.

Q. And is this looseness of associations difficult to fake?

A. No, it didn't. As I said, he went on and on as long as he did. It would make – it would be almost impossible for him to be fake. It's also in the record, and it's also several staff members at the prison told me.

Q. Is it true that in training for some psychologists or psychiatrists that they actually in their school tried to mimic or fake some sort of severe mental illness and see if they could keep it up?

A. I've tried to do that for role plays.

Q. That's what I mean. How do people do?

A. It's hard. It is hard to – I mean, you have to plan it, and you could go on for maybe five minutes and then, you run out of steam. You can't think of any more ways to put these wild ideas together.

Q. Okay. Did you learn in your speaking to the prison guards [31] and others that he's exhibited this behavior to a number of different people over time?

A. Yes. In fact, the question I specifically posed to them is, you know, all – in fact, one officer – we'll start with the first one. The first, Ms. Williams volunteered to me, as I was leaving, and she said – put her arm around me and said, are you okay? And I said, yeah. I'm fine. Why? And she, said because you had to talk to him for an hour and 20 minutes, and I know how it goes. And I said, how is that? And she said he talked about religion and it didn't make any sense and it didn't fit together, and it's really hard to listen to him. You usually turn him out.

Then, I interviewed the second Ms. Williams, on the second day. And I asked her if, you know, this religiosity was common in his speech, and she said yes, that it was, that he does that all the time. That he does it not only in the visiting room, but she said he also does it back on what they call the pods. And sometimes this very much irritates the other inmates, and they would like him to basically

shut up, but he doesn't notice that. He's oblivious to that and keeps on, anyway.

She said that he knows quite a bit of scripture. And she said a lot of times, the scripture is right. He's really quoting the scripture that's actually there, but he just isn't putting it together in the right way. And then, I interviewed [32] the third officer, Ms. Ford, and she basically told me the same thing. And by the way, these were separate interviews.

Q. All right. Would it be surprising to you at all that – well, you reviewed Dr. Parker and Dr. Anderson before. That was one of the things you looked at?

A. Correct.

Q. In that they refer to a Captain Miller who indicates that he could hold a conversation, or he can have a somewhat ordinary conversation. Is that surprising to you if he could actually hold an ordinary conversation that's not about religion, or his execution, or that sort of thing?

A. I have no idea what Captain Miller said. But I know people like Scott Panetti talking about something very concrete in a nonstressful situation often can sound just fine.

Q. Okay. Do you think he understands that he is to be executed because he killed his parents-in-law?

A. No. I think he believes he's being executed as part of a spiritual warfare that's been going on since the middle 1980s.

Q. In your opinion, is his understanding about why he is to be executed grounded in reality?

A. No. I believe the state of Texas wants to execute him because he murdered his in-laws.

Q. Right. But is his understanding – doesn't he believe that the state wants to kill him for preaching the word of [33] God?

A. That's what I think he believes, and that's what he's told other people.

Q. Okay. And –

A. Over time.

Q. – that's not something that would be grounded in reality?

A. No.

Q. Okay. Pass the witness.

THE COURT: Ms. Dettmer.

CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi. My name is Tina Dettmer. I work with the Attorney General's Office. And we've never actually met before, have we?

A. No, we haven't.

Q. I wanted to start off with your – one of your last comments that Mr. Panetti does not know why the state is going to execute him. And your belief is that – or your opinion is that he believes that he's being executed based on spiritual warfare; is that correct?

A. My belief is this is a genuine delusion, yes.

Q. Okay. But you also testified that he knows that the state's – what the state's reason is?

A. Yes.

Q. Okay. And can you tell us, again, what he said about [34] that?

A. He says the state – I don't think I wrote it down exactly, but basically he said the state's saying that they want to kill me because of this murder charge, but that's not reality.

Q. Okay. So he knows – he has some knowledge that this is why the state is saying that. He knows that the state of Texas is saying, this is why we're doing this?

A. Right. He says, this is what they're saying. This is what's real.

Q. Okay. Now, you testified that you reviewed the competency trial from 1994?

A. Yes.

Q. What was the result of that competency trial?

A. He was found competent.

Q. Okay. Are you familiar with the standard for competency to stand trial?

A. Yes.

Q. Okay. Can you tell us what that is?

A. Is that you have a rational and factual understanding of the proceedings against you, and that you're able to assist in a rational, factual manner your attorney.

Q. Okay. Now, if you were to compare that to the standard for competency to be executed, which do you think from a mental health standpoint is more rigorous or difficult for a [35] person to meet?

A. Competency to stand trial.

Q. Okay. Do you remember from your readings of Dr. Simes' reports and the trial what the symptoms were that were reported of mental illness at that trial?

A. Seems to me that they were thought disorder, that he was probably hallucinating, that he had some delusional thoughts, specifically, commenting on religiosity. That's my memory.

Q. What about the loose associations? Were there any reports of his tangential thought or circumstantial thought?

A. Yes.

Q. So that was all reported back at the competency trial?

A. Yes.

Q. And he was found competent then, was he not?

A. Correct.

Q. Okay. And you're aware that that decision has since been upheld?

A. Correct.

Q. Okay. Now, the symptoms that you're reporting that he's manifesting now, or he was manifesting during your interview, are delusions, correct?

A. Correct.

Q. Hallucinations?

A. Correct.

Q. Loose association of thought?

[36] A. Correct.

Q. So essentially they're the same symptoms that he was displaying back in 1994, when he was adjudicated competent to stand trial?

A. I don't know if they're the same. I don't know if the delusions are the same for one thing.

Q. Okay.

A. Because he wasn't about to be executed at that point in time.

Q. Okay. But they are similar?

A. They're in the same category.

Q. Okay. You said that you don't know whether they're the same because he wasn't about to be executed back then, correct?

A. Right. In other words, as far as the delusion is concerned, his belief that the state is going to kill him, not because he has killed someone, but because they're engaged in spiritual warfare.

Q. Okay. So now, he has a different delusion.

Okay. Let's talk about malingering for a second. What – are there any things that you look for, in particular, when you're looking to see if somebody's malingering?

A. Yes. He specifically – let's see if I can get this two-day workshop down to a five-minute answer.

Q. I'm sorry. I apologize. Can I just back up and get you [37] to tell us what malingering is first.

A. Sure. Malingering means that someone is deliberately feigning something for purposes of specific secondary gain.

Q. Okay. And when you say "feigning," you mean making up, or could it be exaggerating?

A. It could be either, and that's one of the things that makes evaluation really difficult.

Q. So there could be some degree of realness to the symptoms, but then, there can also be some degree of exaggeration to the symptoms, as well?

A. Yes.

Q. Okay. I'm sorry. I didn't mean to cut you off.

So basically, someone who is feigning or exaggerating these symptoms for some external incentive, correct?

A. Yes.

Q. Is that what you said? Okay. What might be an external incentive? What might cause somebody to malinger?

A. Well, typical ones you see in the criminal justice is to get out of jail.

Q. To get out of jail? Okay. What about to escape an execution?

A. Sure.

Q. Absolutely. Would you say that's a relatively strong incentive –

A. Absolutely.

[38] Q. – for an individual? Okay. What about are you familiar with the DSM-4?

A. Yes.

Q. Can you tell us what that is?

A. The DSM-4, Diagnostic and Statistical Manual is the manual of psychiatric diagnoses, and it's sort of a guide to what is included in each diagnostic category.

Q. Okay. Can you tell us what the DSM-4 says about malingering as far as signs and symptoms or indicators to look for? Does it have anything to say about that?

A. It is a very short paragraph, and I don't recall what's in it.

Q. Okay. If I told you that – if I showed it to you, would that help refresh your recollection?

A. Sure.

Q. May I approach the witness?

THE COURT: You don't need my permission.

Q. (BY MS. DETTMER) I know there's a big book. There's lots in here. It's the tabbed page right there.

A. Okay.

Q. Once you have reviewed that, can you just tell us what the DSM-4 says about possible indicators?

A. Okay. Are you talking about this section that says, one should be suspected?

Q. Yes. Exactly.

[39] A. Okay. In a legal context – the medical legal context of the presentation, marked discrepancy between the person's claimed stress and the objective findings, lack of cooperation during a diagnostic evaluation and complying with prescribed medication treatments, and the presence of antisocial personality disorder.

Q. Okay. So basically what the DSM-4 is saying about malingering is here are four things that if you see these, you might want to be aware that this person may be malingering. It's possible?

A. You'd certainly want to evaluate.

Q. And the first one you talked about was the medical legal?

A. Context of presentation.

Q. Can you tell us what that means?

A. In other words, they're in trouble.

Q. Okay. So there's some – basically there's some incentive –

A. Right.

Q. – for them to malinger. And the second one was a marked discrepancy between what they're claiming?

A. About their claimed stress or disability and the objective findings.

Q. Okay. So that would be someone who comes in and says, I'm feeling this and then, maybe a psychiatrist or psychologist having an objective view saying, that doesn't really match up. [40] Is that what that's saying? Or can you explain that better?

A. Well, that would mean – no. I think this would mean something more like the person is claiming to have this particular belief –

Q. Uh-huh.

A. – which is bizarre. But then, you ask around to people that they talk to every day, and they don't actually have that belief at all. That would be marked discrepancy.

Q. Okay. And then, what was the third one?

A. Lack of cooperation during diagnostic evaluations and in complying with prescribed treatment/regimen.

Q. Okay. So someone who maybe was deliberately uncooperative could possibly be malingering?

A. Yes.

Q. And the fourth one was the presence of antisocial personality disorder?

A. Correct.

Q. Okay. Now, malingering, is it difficult to determine whether somebody is faking or exaggerating symptoms?

A. It's often a challenge. I mean, it's something we have to do all the time in the forensic context but challenging, yes.

Q. And who is in a better position to determine whether a particular individual has a particular mental illness, somebody who sees them once or twice, or someone who sees them for an extended period of time?

[41] A. That would depend, to some extent, on the qualifications of the person –

Q. Absolutely.

A. – that we're talking about.

Q. Okay. But assuming they're equally qualified?

A. Then, I think the other thing that you would look at is not only the time over which you observe them but the records that you have. I mean, you may not have personal observations, but you have records of not just one person but many people. And that's what you put together into an evaluation whether someone's malingering.

Q. Okay. So you're saying – are you telling me that it doesn't matter how long a person sees an individual as far as making a determination of malingering? Assuming that we have two equally competent mental health professionals and they have the same records and observations, is one of them in a better position to determine whether someone is malingering? Is it easier to do after one or two interviews, or is it easier and more accurate to do after seeing him for months or a period of years?

A. Certainly more observations are better.

Q. Okay. Thank you.

Now, considering – I'm sorry, let me back up again. What about a history of malingering? If an individual has – if there are signs in his records that he has malingered in [42] the past, does that factor into your evaluation of whether he could possibly be malingering in this particular instance?

A. It would certainly be a factor, yes.

Q. Would it be an important factor?

A. That would depend on what you're weighing it against. It would certainly be a factor.

Q. Okay. Were there any indications, or signs, or things that you should maybe suspect, are reasons to suspect that Panetti was malingering in this case?

A. Very little. We had some prison records which malingering tended to be ruled out, and I read those rather carefully, and they said malingering was a rule-out, but they really didn't justify why they thought he was malingering, especially on top of all of these other records by a myriad of professionals suggesting that he wasn't.

Q. Okay. So you reviewed his history; is that correct?

A. Yes.

Q. Okay. If I may, your Honor. I'm going to show you what's been marked as Respondent's Exhibit 3, and ask you just to kind of briefly look through that and tell us if you recognize those.

A. Obviously, I can't tell you page-by-page.

Q. Right.

A. But this appears to be a piece of the mental health records from TDCJ that I had.

[43] Q. Okay. And is there anything in the records from the TDCJ mental health – the mental health records that indicated that he had been malingering in the past? Can you point to anything in there that says –

MR. HAMPTON: Judge, I'm going to – there is a report by a doctor who is not going to appear. So I object on confrontation grounds.

THE COURT: You can object on confrontation grounds, but your witness has given an opinion based on those records. Your objection is overruled.

Q. (BY MS. DETTMER) Okay. If you could, there's Bates numbers on the –

THE COURT: The witness has already testified she reviewed the information there. She testified it on direct testimony. She also indicated that she couldn't find anything in the records that the conclusions or the impressions were based on, and counsel's entitled to cross-examine her on that point.

Q. (BY MS. DETTMER) Okay. On the bottom of those pages there are Bates numbers. And if you would turn to page – what's been marked as page 79. And I know some of these are really difficult to read, but we're going to try to get through them because I think they're important.

A. All right. I think I've got the right page.

Q. Okay. And there's a notation that says 10-26-95?

[44] A. Yes.

Q. At 11:30. It's on the bottom of the page?

A. Uh-huh.

Q. Can you read through that entry? And you don't have to do it aloud. I'll give you a second to read through it, and see if that refreshes your recollection about whether there are any indications in the medical records that he may have been faking or malingering. And it starts on 79 and goes to 78, because they're backwards.

A. And I am having a hard time reading it.

Q. Okay.

A. But if I'm understanding correctly, what it says was that he was apparently given a Rorschach, which is not a test I would use to determine if someone was malingering.

Q. Right.

A. And that he seemed evasive, which would not be surprising if someone was psychotic to be basing it on a Rorschach. And then, this person seemed to think that it wasn't due to florid psychosis, but I'm not certain why.

Q. Okay. On page 78, does it say – does it not say that he may have some loosening of his thought processes, but this appeared to be intentional on his part to create the impression of mental illness?

A. Well, you know, that's a very opinionated statement, but it doesn't tell me anything about the Rorschach scores that [45] would lead you to believe that.

Q. What I'm asking you is if there was a mental health professional who documented this on his records –

A. Yes.

Q. – it appeared there.

Okay. Could you turn to page 7 – I guess it's on that same page. Page 78, I'm sorry, where it says, December 7th, 1995?

A. Uh-huh.

Q. And on the second line does it read, he came into the room, talking gibberish and nonsensical? Do you see where we are?

A. You're doing better than I'm reading this handwriting. I think that's what it says.

Q. Okay. He came into the room talking gibberish and nonsensical. As I began to ask questions pertaining to how he was doing, he immediately began asking lucid questions relating to why he is not being treated.

A. Okay.

Q. Do you read that? Okay. So this particular instance, he came in talking gibberish and nonsensical but then, when asked lucid questions, he could respond?

A. Which is – as I said, would not be surprising for someone with a thought disorder like Panetti's.

Q. So he can turn it on and turn it off?

[46] A. Depending on what he's talking about and the level of stress.

Q. Okay. Fair enough. If we could continue and turn to page 110 of those records. And if you could start reading

for me – and this is typed, so it should be easier. He talked about wounded sunburn –

THE COURT: Counsel, I sustained the objection of the petitioner's counsel with regard to a question. R-3 is not in evidence. And you're reading from an exhibit that has not been admitted into evidence. Now, counsel can stay asleep, if you wish, or you can object, if you wish, but we're going to have to resolve this at some point in time.

MR. HAMPTON: Re-urge the same objection.

THE COURT: Re-urge the same objection on confrontation on a record that could be proved up as a –

MR. HAMPTON: Yes.

THE COURT: – business record.

MR. HAMPTON: Yes. And under 803.

THE COURT: Well, under 803, I overrule it. That's the whole point of me being here. That's the whole purpose of me scheduling two days to try to determine what I need to determine.

MS. DETTMER: Your Honor, I would move that we admit the Exhibit 3.

THE COURT: Then, you'll have to prove it up like a [47] real lawyer.

MS. DETTMER: Okay.

THE COURT: All right.

MS. DETTMER: Is it possible to take a witness out of turn to do that?

THE COURT: Yes. All you have to do is tell me that you're going to prove up these records that the witness has reviewed and, apparently, are the documents of the Texas Department of Criminal Justice, and that you are going to prove them up as business records. Are you going to do that?

MS. DETTMER: Yes, I am, your Honor.

THE COURT: The objection's overruled. You may proceed.

MS. DETTMER: Okay. I'm sorry.

Q. (BY MS. DETTMER) Going back to Exhibit 3, page 110, starting with he talked about wounded sunburn. Can you tell us what the doctor noted in that particular instance?

A. Well, he was saying that he talked about this wounded sunburn and that there seemed to be switches in his vocabulary and tone of voice. And then, in this doctor's opinion, it seemed well-rehearsed and had the distinct feeling it was contrived. Patient had own agenda, kept turning this interview toward the alters. He seemed to want to lead us or impress us. Again, that was his opinion.

Q. Okay. So there was a mental health professional who's of [48] the opinion, again, that Mr. Panetti may have been deliberately trying to prove that he had some sort of mental illness, correct?

A. Yes. Uh-huh.

Q. Okay. If you would look at page 72 of that exhibit. And, again, I apologize. I know these are difficult to read. But about halfway down the page, does the doctor note in

that particular instance that the patient is not as confused as we originally thought he might be?

A. Does he note that, yes.

Q. Okay. And this was in – what was the date on this one? I'm sorry.

A. January 4th, '96.

Q. Okay. So we begin in October of 1995, and now we're up to January of 1996, and a couple of months have gone past, and the doctors apparently have been evaluating him. And correct me if I'm wrong, because you've reviewed these records – and they still continued to believe that he is not as confused as he originally made out to be; is that correct?

A. They continued to question that, yes.

Q. Okay. What about on page 65, in an entry for February 27th, 1996?

THE COURT: What was the date, counsel?

MS. DETTMER: That was February 27th, I believe, 1996. And can you tell us if there's any indication in this entry [49] that Mr. Panetti may be malingering?

A. Simply Dr. Gilhousen's opinion that this looks like malingering.

Q. (BY MS. DETTMER) Okay. What about turning over to page 60? In an entry dated April 16th, 1996, is there anything in this entry to indicate that he may be malingering or exaggerating his symptoms?

A. I can't quite read it, but this individual believes that this might have been, obviously, manipulative and theatrical.

Q. He's speaking about Mr. Panetti; is that correct?

A. Yes. Uh-huh.

Q. Let's turn it to page 57. And in an entry dated 6-10-96, what remarks does the mental health professional make there regarding Mr. Panetti?

A. Okay. Let's see if I can read that. He said he was clear – this has to do with the disciplinary hearing. He said he was clear and logical in the disciplinary hearing, and symptoms seemed to be consistent with Axis II.

Q. Okay. Does it also say –

A. He said he doubted his Axis I diagnosis.

Q. Clear cognitively and manipulative?

A. That was Dr. Gilhousen's opinion on that day.

Q. Let's look at page 32, and this is in August 29th of '97. I'll give you a second to read that. At about halfway down where it says, no thought or perceptual abnormalities were [50] observed, can you read that for us?

A. I think so. It says, no thought or perceptual abnormalities were observed although he may have adopted some religious preoccupation. For example, his spiritual treatment regimen, that is, something in a reference to Jesus in the bible. His self-diagnosis – of course, it wasn't a self-diagnosis – of schizo-affective disorder, appears to be arrogant and narcissistic, I'm special, if not another game like his previous diagnoses.

Q. Okay. Let me see. It says, his self-diagnosis of schizo-affective disorder appears to be an arrogant and narcissistic. And in quotations, it says, I'm special, gesture if not another game like his previous diagnoses of schizophrenia and multiple personality disorder.

A. That's Dr. Gilhousen's opinion and he's consistent by it.

Q. That's right. And he's seen him now – this is in 1997 so this is two years later. He's seen Mr. Panetti for two years, and he continues to maintain this same opinion, does he not?

A. He does.

Q. Now, based on your review of these records, from 1995 until this period of 1997, what did you note from those records? You've said that you reviewed them.

A. Well, I noted specifically that he was sent to Jester IV twice. And Jester IV is an inpatient facility where they have people who they suspect of having mental illnesses. He first [51] did time at Jester IV. He ended up being returned to his unit with an "I'm not sure, rule out everything" diagnosis, but he maintained on his psychotropic medication. And then, the second time was in 1997. And I don't know where exactly Dr. Gilhousen's notes come in terms of these hospitalizations. And at that point, again, they didn't come to a definitive diagnosis, and he left against medical advice. He demanded to leave.

Q. He demanded to leave?

A. He demanded to leave.

Q. Okay.

A. And so, as I look at that, there was a lot of uncertainty.

Q. Okay. Let me just – okay. I'm sorry. Continue. I asked you a question. You may answer.

A. No. Simply that – as I said in my direct testimony, I think there were several – Dr. Gilhousen being one – professionals at TDCJ that were absolutely convinced that this person was playing games. However, again, I think that is in contrast to the record of his entire life. I respect Dr. Gilhousen. I know him quite well. I think in this case he was mistaken.

Q. Okay. So the bottom line is, though, that for several years while he was in TDCJ, there were doctors who in their opinion believed that he was malingering?

A. Two.

[52] Q. Okay. And we've already talked about the fact that Panetti has a rather strong incentive in this case to malinger, does he not?

A. Yes, he does.

Q. Okay. He knows he's going to be executed?

A. Correct.

Q. Okay. When you began your interview, did you tell him the purpose of your interview?

A. Yes, I did.

Q. What did you tell him?

A. I can read it to you, if you'd like.

Q. Sure.

A. Dr. Conroy will only be conducting evaluation and will not provide me with any treatment. She will be evaluating me for the purpose of assessing whether or not I'm confident to be executed.

Q. Okay. So he knew why you were there, did he not?

A. He heard it, at least.

Q. Okay. Now, one of the other indicators or signs to look out for when someone is malingering is lack of cooperation, is that correct, in an interview, according to the DSM-4?

A. It's one of the things you look at.

Q. You said you reviewed Dr. Anderson and Dr. Parker's report?

A. Yes.

[53] Q. And their conclusion was that he was uncooperative; is that correct?

A. That was their conclusion, yes.

Q. Okay. Let me ask you this: When you went in, did you greet Mr. Panetti?

A. Did I greet him, in other words, say hello and shaking hands with him, yes.

Q. Did he respond?

A. Yes.

Q. He did. So he responded to your greeting?

A. Yes.

Q. Now, going back to Dr. Anderson and Dr. Parker's report, I believe, if you'll recall, they mentioned that he wouldn't even respond to their greeting. Is that correct?

A. I don't recall that specifically, but you may be correct.

Q. Okay. Now someone who has made a loose association of thoughts or schizophrenia, they're not incapable of responding to a personal greeting, are they?

A. Not necessarily but at any one time –

Q. Because he, obviously, responded to yours, did he not?

A. Those were different times. What was in his head at that time, I have no idea.

Q. Okay. But he responded – the point is he responded to your greeting?

A. Yes, he did.

[54] Q. Did he know that you were appointed by your lawyers – by his lawyers, I'm sorry?

A. Well, he didn't seem to because, apparently, there had been some miscommunication, and the name Keith Hampton meant nothing to him. He didn't know Keith had been appointed. So when I said – you know, he said, have you been sent by the court lawyer? And I said, yes, I've been asked to interview you by Keith Hampton. He'd never heard of him. So that was a rocky start to begin with.

Q. But he didn't know why you were there?

A. He knows I was there to do an evaluation.

Q. First competency to be executed?

A. Yes.

Q. Now, in your review of his extensive records, did you ever find a diagnosis for anti-personality disorder?

A. I think you meant antisocial personality disorder.

Q. I'm sorry. You're absolutely right. Antisocial personality.

A. Yes.

Q. All right. Which is also another indicator that a person is – could possibly be malingering?

A. You know, that's what the DSM says, but there's been some recent research on that by one of my colleagues.

Q. Okay.

A. And there doesn't seem to be much of a correlation between [55] antisocial personality disorder and malingering.

Q. Okay. But he does have a history – a documented history where doctors have thought that he's been malingering in the past?

A. Yes.

Q. And he has –

A. TDCJ.

Q. Okay. So, Doctor, is it possible that Panetti could be malingering in this situation?

A. It's possible in the sense its possible like the sun could rise tomorrow. I think it's highly improbable.

Q. But it's possible?

A. Anything's possible.

Q. And you saw him how many times?

A. Twice.

Q. Twice.

Now, you talked about – I'm sorry, counsel asked you about Major Steve Miller's conversation, and you said that it did not surprise you that he could hold an ordinary conversation?

A. No, it didn't surprise me.

Q. Okay. Would it surprise you that if he's able to hold ordinary conversations many times during the day with prison guards, would that surprise you?

A. No.

[56] Q. Okay. Is there any significance in the fact that the only time he apparently cannot hold a normal conversation is when he's being interviewed by mental health professionals?

A. Well, but that doesn't seem to be the case, because when you talk to the officers about his preaching and his religiosity and his relationship with the other inmates, he talks about his disconnected religious ideas all the time, not just mental health professionals.

Q. Okay. But he can answer questions –

A. Oh, sure.

Q. – can he not? Now if he was unable to do that, or refused to do that, in the interview with Dr. Parker and

Dr. Anderson, it would appear that that would be on purpose, would it not?

A. Not necessarily. I wasn't there for the interview. I don't know what his mental state was at that time.

Q. Okay. Fair enough.

As far as this loose association of thought, are there degrees of severity to this disorder?

A. Yes.

Q. So someone – is it possible – and I'm just asking if it's possible. Is it possible that someone could have some degree of this and, yet, exaggerate that?

A. In the sense that probably anything is possible, however, it's difficult to imagine someone exaggerating anything if [57] they're that confused. I mean, what you're implying is that they're going through some kind of mental machinations and planning this. And I think Scott Panetti, at this point in time, would have difficulty planning something that sophisticated.

Q. And that's your opinion?

A. It is.

Q. And I want to go back and talk about your conversation with him about the stay of execution and the individual that apparently was recently executed and Mr. Panetti's ability to understand that if you got a stay, that you were coming back, but if you didn't, you weren't.

A. Yes.

Q. So based on your opinion, he knows that if he gets a stay of execution, he's good; is that right?

A. That he doesn't get executed at this time, yes.

Q. Yes. And he's able to understand that?

A. He is able to understand that.

Q. I'll pass the witness, your Honor.

THE COURT: Okay. We'll take a 15-minute break.

(Recess.)

THE COURT: You may return to the stand, please, ma'am. You understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: You may redirect.

[58] RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Mr. Panetti – you reviewed those prison records, right?

A. Correct.

Q. Was he sent to the Jester Unit?

A. Yes, he was sent to Jester twice.

Q. When was that –

A. Once was in –

Q. -- approximately?

A. Once was in 1995 and once was in 1997.

Q. Why do you send an inmate to Jester?

A. Because there's a suspicion he may need psychiatric treatment in an inpatient setting.

Q. All right. Did they prescribe mainly psychotic medication according to those records?

A. They prescribed medication the first time.

Q. All right. Throughout this time, since he came to the prison, were there a number of other mental health observations made or records that reflect that he is genuinely severely mentally ill?

A. Well, there were a number of observations that led to his being sent to Jester for suggesting he's mentally ill.

Q. All right. So Dr. Gilliland's and Gilhousen's are sort of the exception to the rule of other people who have examined [59] him and decided that he is genuinely schizophrenic or severely mentally ill?

A. I'm not so – I can go so far to say that because the records are copious and you almost have to go through them note by note, which I did at one point but not recently. But Dr. Gilhousen and Dr. Gilliland seem absolutely determined that this man is malingering. And, again, my problem with that is the statements as to why are simply that's what they think.

Q. What test did they administer to come to that conclusion?

A. Well, as I said earlier, Dr. Gilhousen apparently had administered the Rorschach.

Q. Besides the Rorschach, what can we tell from those records?

A. Again, I read their notes and I have no idea why they've determined that this person is malingering, especially given that there's a history going back to the early 1980s of all kinds of mental health professionals, hospitalizations, et ceter [sic], saying that this was a genuine mental illness and that all of this occurred before he committed any crime. So I was baffled as to why they were so absolutely convinced with such faint notes that he was malingering.

Q. How long did these doctors spend with him?

A. You can't tell from the record.

Q. How many other people did these doctors speak to about Mr. [60] Panetti?

A. I don't know. I don't know what records they had, or that I don't know.

Q. We don't know what records they reviewed either, do we, from these records?

A. I don't know.

Q. All right. How would one know to fake one particular delusion? How would Mr. Panetti know that if he can't appreciate or give a rational explanation or connection between his execution and the murders in 1992, how would he know to fake that particular item with you?

A. Well, it's not just that he said that to me. At least according to Karin, his visitor, and according to his mother, these are things he's been saying for a long time.

Q. For a very long time, would that also include before the killing of his in-laws?

A. Well, before the killing of his in-laws, the records indicate that, you know, he felt that he was being persecuted by demons. I mean, that's clearly in the records. And as late as July of '92, the murders occurred in September of '92, I believe, when he was hospitalized he was claiming to be a Nazarite and being persecuted for that reason. So, I mean, this is not a new idea to him.

Q. And, also, through the '90s, don't the – you've reviewed the disciplinary records, as well, haven't you?

[61] A. Yes.

Q. Okay. And don't those disciplinary records reflect that he refused to groom himself on the basis that he was a Nazarite?

A. Yes, he has numerous considerate reports for refusing to shave.

Q. All right. So to a lot of different people he's going to look uncooperative. Is that a fair characterization of someone who is suffering from a brain disorder such as his?

A. I don't think it's fair because, as I said, when I interviewed him, some people would have judged him to be uncooperative. Why? Because he didn't directly answer my questions, because he was suspicious of me, because he demanded to know things that I, obviously, wasn't going to tell him.

I had no thought that this was simply an uncooperative person. I think this was a person with a genuine mental illness that the mental illness was interfering with their cooperation.

Q. You were asked during cross-examination so he can turn his mental illness on and can turn it off, turn it on and turn it off. Were you implying by that that he's got a conscious intention of making his mental illness take over his mind at will?

A. No. I think what I said – and if I misspoke, I [62] apologize. But I think what I said was, there are times when someone with a mental illness can answer concrete questions. Particularly, for example, on the first morning that I saw him, there was a great discussion about whether or not he was going to put on a clean jump-suit. And I think the conversation around the putting on the jump-suit, as I understood from the officer, was quite logical; but if you back away from that, the idea that he if he really understood that I was there to evaluate him for competence to be executed probably whether – which jump-suit he wore was not the central issue to be concerned about. But in terms of discussing the jump-suit, he was probably fine.

Q. When we talk about exaggeration, by exaggerated features or responses, are you saying that that is malingering if someone is mentally ill – let me ask you this first: Can a person who's mentally ill exaggerate their symptoms?

A. Yes.

Q. Okay. Do you think he was exaggerating his symptoms when he was interviewed by you?

A. If anything, oddly enough, he was pulling them down.

Q. What makes you say that?

A. Well, there was the thought disorder, and that was clearly there. But then, I would throw out questions which you typically ask people about mental illness. For example, do you hear voices? Well, he punted on that one. But then, when [63] he talked about God, I said, well, do you hear God talking to you? And now that's hallucinations, voices are the classic symptoms that people endorse regarding mental illness. They're the classic symptoms that malingerers endorse. And he started by saying, yes, God talks to me, and then, he very quickly said, well, He talks to me through His word and He talks to me through the bible, despite the fact that there's a record – other, you know, earlier hospitalizations that he admitted to hallucinations. He's talked to other visitors about hallucinations.

But suddenly, I'm interviewing him and he doesn't admit to me hallucinations, which would be the obvious one to endorse. And then, I asked him about the Sergeant Iron Horse, and Ranahan, and collection of people, Sarge, that he seemed to believe had some connection with him, and he blew that off. He didn't talk about people living inside of him. He didn't talk about people controlling him, although he's talked to some other people about that. He said, well, Ranahan just means top hand. That's what that meant.

Q. He was playing down Sarge Ranahan with you?

A. Yes.

Q. And someone who's faking more likely would have gone for the hallucination, and isn't that what malingerers typically do?

A. Typically they do.

[64] Q. All right. Are you familiar with Dr. Richard Rogers' clinical assessment of malingering and deception?

A. Yes.

Q. Second volume, second edition?

Do you agree with this statement, malingering is listed in the DS-4 – DSM-4 as a condition not attributable to a mental disorder? It's defined as the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives. Malingering requires a deceitful state of mind.

Do you agree with that description of what malingering is?

A. Yes. And I don't think that in any way contrasts to the one in the DSM.

Q. And malingering is somewhat specific. Or at least your attempts to uncover when you're interviewing somebody for malingering, it's somewhat specific to the claimed illness such as amnesia, you would try to test him in one way. If they're faking a psychosis, you would test them in another way; is that fair?

A. Correct.

Q. Okay. And your opinion, again, on whether or not he is faking, specifically, the delusion that he is being executed for preaching the word of God, do you think that he is malingering on that delusion?

[65] A. I don't think he's malingering on that delusion.

Q. Okay. You read Dr. Parker and Dr. Anderson's report?

A. Yes.

Q. What did you think about it? Anything stand out from your point of view? Did it seem like it was a pretty ordinary clinical report?

A. Could you be a little more specific? I'm not sure what you're asking me.

Q. Have you reviewed other competency evaluations in the past?

A. Yes.

Q. Okay. How does the report by Parker and Anderson compare with what the other evaluations you see in the past in terms of the language that's used, the basis of their ultimate opinion, that sort of thing? Do you have an opinion?

A. I was surprised both of them interviewed him simultaneously. That was a little unusual. But other than that – again, if you have a specific question.

Q. Well, what did they leave out that you think they might have included?

THE COURT: It looks like all the lawyers are asleep today. Has the long holiday cleansed your minds of objections to evidence? Her opinion is not relevant. Let's go to the next issue, please.

Q. (BY MR. HAMPTON) Do you think that Mr. Panetti's [66] delusional system is a form of punishment?

A. I'm not sure I'm following you.

Q. Madness –

THE COURT: By whom, God?

MR. HAMPTON: No, Judge. *Ford vs. Wainwright* contemplates this as one of the bases for sparing Mr. Panetti, so I thought I'd ask my expert about that.

THE COURT: Well, they – you'd better ask it in such a way that at least the Judge understands it, as well as the witness.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) This delusion system that he has includes persecution, right?

A. Correct.

Q. He thinks he's constantly under attack by demonic forces that are trying to hurt him?

A. Correct.

Q. Okay. He lives with the belief that these various supernatural forces are conspiring and seeking him harm, right?

A. Right.

Q. Isn't that a form – isn't that a kind of a delusion that is a form of punishment for the person in your opinion?

A. I could only answer that in this way. It seems to have made his life miserable for years.

[67] Q. Okay. The other is that he's told you that he believes in other personalities, Sarge Ranahan killed his in-laws.

A. He didn't tell me that, no.

Q. But you've seen that reported –

A. Yes.

Q. – elsewhere. In Dr. Arambula's 1997 report, I think he mentions it there, right?

A. Correct.

Q. Okay. If he believes that other forces caused their deaths, then how can he come to grips with his own conscience? Have you got on opinion on that?

A. In his state of mind – I'm not sure I quite understand the question. But in his state of mind, God has forgiven, wiped the slate clean. It's all null and void. Oit [sic] is all simple and he can go back and visit them.

Q. Okay. So there's no reason to be coming to grips with his own conscience.

Is his delusionary belief – well, how can he maintain his delusionary belief, yet, have ordinary conversations with guards and other people?

A. Delusions tend to be content-specific. And, in fact, when you're talking to someone with a pure delusionary disorder, which he doesn't have, he has a schizophrenic one – but if you have someone who only has a delusion and that's their only symptom, unless you bring up the topic, you'd never know there [68] was anything wrong with them.

Q. And your opinion is he is incompetent to be executed?

A. In my opinion, he doesn't understand why he's being executed.

Q. All right. Pass the witness.

THE COURT: Do you have any further questions for this witness?

RE-CROSS EXAMINATION

BY MS. DETTMER:

Q. Ms. Conroy, you were asked if the opinions reflected in the medical records regarding the fact that Panetti – or they noted that Panetti was malingering was the exception, and your response was no?

A. My response –

THE COURT: She said she couldn't say, one way or the other, without rereading all of the information.

Q. (BY MS. DETTMER) Okay. Can you point to anywhere in Mr. Panetti's mental health history at TDCJ where somebody has actually diagnosed him with schizoaffective disorder?

A. Jester IV in 1995 had everything as a rule-out including schizo –

Q. Okay. But I'm saying in the last nine years of Mr. Panetti's life, can you point to a diagnosis of schizoaffective disorder in his medical records?

A. No.

[69] Q. Okay. Now, as far as the vagueness of the notes that you refer to with the doctors who noted that he was malingering, you don't know how long they matched, correct?

A. Correct.

Q. You don't know – just because there are no tests reflected doesn't mean there weren't tests conducted; is that correct?

A. It would be odd if they weren't in the medical records.

Q. Okay. And discussing all of Mr. Panetti's mental health issues prior to the crime in 1992 and leading up to the competency determined in 1994, he was, in fact, found competent in 1994, was he not?

A. Correct.

Q. And in addition to there being indications in the record that he was uncooperative, was there also not indications that he was manipulative?

A. In Dr. Gilhousen's opinion, yes.

Q. Which is different than –

THE COURT: Counsel, this is rebuttal of redirect. You've gone over that in detail.

MS. DETTMER: Okay. I have no further questions.

THE COURT: Under the old math, 1994 would be ten years ago, wouldn't it?

THE WITNESS: Correct.

THE COURT: Now, counsel asked if you were certified [70] in forensic psychology. Tell me what that means in Texas. Is there a license?

THE WITNESS: No. Actually –

THE COURT: And then, certification by an organization?

THE WITNESS: I have a license in the state of Texas, otherwise –

THE COURT: No one asked you that so that –

THE WITNESS: But I am. I do have a license.

THE COURT: I assumed you were and I thought we needed that in the record.

THE WITNESS: Board –

THE COURT: Tell me about your education, your degrees.

THE WITNESS: I have a degree from – in clinical psychology and doctorate from the University of Houston in 1976. And then, I pursued board certification, which is a diplomate awarded by the American Board of Professional Psychology, which is a national organization. It takes four to five years to go through all the procedures to get that. I received that in 1992.

THE COURT: And since I have never gotten a report from Springfield that anybody was mentally ill, I'd like to know what years you were there.

THE WITNESS: 1979 to 1989.

[71] THE COURT: Okay.

THE WITNESS: I was in charge of the service from 1984 to 19 –

THE COURT: Well, didn't start getting letters from them till '91. So that explains that.

One of the things that I'm concerned about, among many, is prior to your walking in on Mr. Panetti for the first time, do you have any idea whether or not he had been prepared, or knew anything from his lawyers, his family, or anything, that someone was coming?

THE WITNESS: What I was told by the attorneys was that some time – how long that was, I don't know – some time before Mr. Gross had sent him a letter, telling him that someone would be coming to evaluate him. However, after the first meeting, I think I mentioned earlier, I found out from Mr. Hampton that Mr. Panetti had never been told Mr. Hampton's name and had never met Mr. Hampton.

And so, when I came in and said, your attorney, Keith Hampton, has filed this motion and his evaluation has been ordered by the Court, he didn't know who Keith Hampton was, and he looked very suspicious and concerned. And so, that's where it started off. And it wasn't until, actually, between times that I talked to Mr. Hampton that I realized what the confusion was that the only name he knew was Michael Gross, and that wasn't the one that I was using. And so, he didn't [72] know where all this was coming from.

THE COURT: But the only information you have is that a letter had been sent.

THE WITNESS: Yes.

THE COURT: Okay. How would one evaluate a person if the person wouldn't communicate in any way, shape or form with them?

THE WITNESS: If that – and I've had cases like that.

THE COURT: I've had them in the courtroom. I've also had them in the courtroom where they didn't have any hesitancy in talking more than a day and a half much less than an hour and a half.

THE WITNESS: If I was lucky, I would have this person as an inpatient. And, therefore, Mr. Greer, in the Greer case that I mentioned earlier, was one that I had that I had four months of observation on.

THE COURT: A person who has been observed as much as Mr. Panetti could easily eliminate observation by either non-communication, or singing, or that type of thing?

THE WITNESS: He could certainly not communicate if he chose to.

THE COURT: Well, that's not my question. My question is with the experiences he's had with evaluators, whether they be psychologists, psychiatrists, doctors, lawyers, juries, whatever, he could well learn that failure to communicate [73] would prevent an evaluation?

THE WITNESS: He could have learned that, but at that point – and it's one of the reasons I talked to the staff. At that point, you look at what the observations are.

THE COURT: But you had –

THE WITNESS: Is this typical of him; does he talk this way all the time; does he do this all the time; does he sing hymns all the time, or is he just doing this for my benefit.

THE COURT: Now, as I understand your testimony, you see recorded in the records symptoms of your diagnosis well back in history, even before the criminal conduct that he was convicted of.

THE WITNESS: Yes, your Honor.

THE COURT: Is there any way to differentiate the degree of the mental illness? I mean, was it just as bad when he was in the process of his criminal conduct as it was in 1994, when he had his trials, or at the time that you saw him? Or is there any way for you to make any kind of protestation about that?

THE WITNESS: Some of it would depend on whether or not he was treated, and there are few observations on that that I think are important. At the time that I saw him at Polunsky Unit, to the best of my knowledge, what I can read from the records, he had not been on any kind of psychotropic [74] medications since 1995, which gave him time to deteriorate.

On the other time – other hand, at the time of his competence evaluation, it was only shortly before the trial proceedings that he discontinued his medication. He was actually medicated at Bell County jail for several years after his initial incarceration in 1992. So he had been off medication for a short period of time.

Then, in the '80s, you see him on and off and on and off medication. And, obviously, when he's not in the hospital, you don't have an exact record of that. It is likely with Mr. Panetti that his condition would be worse the farther he is from the medication, although one can't – I mean, one can't put a statistical formula on that.

In fact, one of the reports that was really telling to me on that – Dr. Simes interviewed him in 1992. And at the time Dr. Simes interviewed him – in fact, it starts out Dr. Simes' report talks about including antipsychotic Trilafon, the medication that he was on at the time, and then, goes on to say certainly some symptoms were there. And Dr. Simes was convinced he was mentally ill.

But you can tell from a lengthy report that he was able to carry on a reasonable conversation on medication, about the issues involved in the trial, which is another thing that leads me to believe that he is not malingering and that medication is apparently effective.

[75] THE COURT: Or that he just simply deteriorated with or without medication.

THE WITNESS: Without it, at least, he deteriorated.

THE COURT: But your information from review of the records is that he has not had any antipsychotic medication since 1995.

THE WITNESS: As far as I know. I could not find it in the record, and I asked him and he said, well, after I got out of Jester IV the first time, I took Depakote for a while. I think he took Depakote and something else, if I recall, but I don't see any record that he's had any medications since then.

THE COURT: Did you have the impression that he knew who you were the second time you walked in?

THE WITNESS: When he saw me, yes. But apparently, when they initially went up to tell him – and I had told him the Thursday that I was coming back on

Monday. I told him that specifically. But he didn't seem to know who's there. He said, unless it's my family, I don't want to see anyone. Unless it's my family or my lawyer, I don't need to see anyone.

And they explained my name and that I was an evaluator. And then, he sent down the question, well, is this court-ordered, which didn't seem to be connected – connecting me to the person he had seen the week before. Now, when he [76] greeted me, he seemed to know me.

THE COURT: Any further questions?

MR. HAMPTON: Yes, Judge, just one thing. Can I approach the witness?

THE COURT: You don't need my permission.

MR. HAMPTON: I'm sorry.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. I want you to take a look at – this is one of the jail records where I've highlighted it. Can you make that out?

A. To be perfectly honest, no. Somebody called.

Q. You were asked earlier if anybody had ever made any mention about a diagnosis of schizo-affective disorder. That 820 line there, page 26 of the soon-to-be exhibit.

A. Diagnosis given was Axis I Schizo-Affective Disorder.

MS. DETTMER: I'm sorry, your Honor. We don't have a copy of what she's looking at.

MR. HAMPTON: That's page 26 of the same – of your exhibit.

MS. DETTMER: I'm sorry. I didn't catch that.

MR. HAMPTON: Could you say that again?

A. It says – I think this is Ms. Thayes, but I imagine that's a medical records person. Said, "Diagnosis given was Axis One Schizo-Affective Disorder."

Q. All right. Thank you. That's all I have, Judge.

[77] THE COURT: Any further questions by the state?

MS. DETTMER: No, your Honor.

THE COURT: You may step down.

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SUSANA A. ROSIN, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

[77] BY MR. HAMPTON:

Q. Are you a licensed psychologist?

A. Yes, sir.

Q. When were you licensed?

A. I was licensed in 1985.

Q. Are you in private practice?

A. I am.

Q. How long have you been?

A. Since 1985.

Q. Where?

A. In Houston.

Q. Okay. When did you get your Ph.D?

A. I obtained my Ph.D. in 1984.

* * *

[79] Q. Did you interview and evaluate Scott Panetti?

A. Yes, I did.

Q. When did you do that?

A. I interviewed Mr Panetti on September 1st.

Q. All right. That was after Dr. Conroy did?

A. That's correct.

Q. What did you understand your purpose of the visit to be?

A. The purpose of my visit was to establish or to help establish competency to be executed.

Q. Okay. Did you – how long was your interview? How long did you stay with Scott Panetti?

A. I was there for almost five hours.

Q. Almost five hours?

A. Yes, sir.

Q. What was his demeanor toward you at that time?

A. When I first got there, I introduced myself. He was highly suspicious. I had to explain who I was, the purpose of [80] my visit. He did not recognize your name again. What I did is I pulled out the papers, because I had the paperwork that I had to fill out with TDC to be able to make the visit, and I showed him your signature, and my driver's license, basically, whatever form of identification I had with me, to convince him of who I was; and then, asked him if he wanted to talk to me and that it was important that we talked, if he could, if he would agree to it.

Q. Was it surprising to you at all that a paranoid schizophrenic would be suspicious of you?

A. No. His demeanor was consistent.

Q. All right. Was he cooperative with you?

A. Again, that's – it depends on how you define cooperative. I think he was as cooperative as he could be, based on my understanding of him and how a person with those kinds of symptoms would present himself. He was very suspicious. He was very guarded with me. And he had a lot of difficulty maintaining train of thought. So he had a lot of difficulty answering direct questions. He would go off on tangents. He would become circumstantial. He would go around in circles and come back to the answer eventually, but it was very difficult to communicate with him.

Q. Is that consistent with someone suffering from schizophrenia?

A. Yes.

[81] Q. Did you pretty well just let him talk and then, later guide him?

A. Well, I didn't have a choice, again. I mean, he would ramble on about many different subjects. And I interjected questions and tried to bring him back to certain topics that were important for us to discuss. But it was very difficult for him to adhere to a train of thought. He would continue to just ramble on and on and on on different subjects.

Q. What did he talk to you first about?

A. The onset, I told him I had reviewed some records. And I had seen an old Navy photograph of his, and I thought that would be a good way to break the ice with him. And for some reason, he became fixated on the types of hats that they wear in the Navy. And he described hats for me and rambled on about the hats, among many other things that he was discussing at the time. But he kept coming back to a particular type of hat that they wear in the Navy that is a cup-shaped hat, and how they wear the hat, and how you're supposed to put it on your head, and so forth. And he rambled on and on about this, interjected with many other things. But he went on for probably ten minutes.

Q. You could at least follow the hat train of thought, I suppose?

A. Correct. And he had some other things interjected in there, too.

[82] Q. Okay. You spent five hours with him. Is it important to spend time with someone you're evaluating?

A. Yes. I think especially in this case.

Q. Okay. Why is that?

A. Because the type of thought disorder that Mr. Panetti displays, which is characterized by this type of flight of ideas, it's very important to see whether or not he can sustain that type of thinking in terms of looking at issues, like malingering, which would be crucial in this case, whether or not he could sustain that type of behavior and thought patterns and speech for a prolonged period of time, and he did in this case.

Q. Did he, at some point, tell you why he believed you were there?

A. He told me that I – well, I had explained it to him beforehand that I was there to assess his competency to be executed, and at some point, he told me that I didn't need to waste my time, that he mine [sic] as well come out and tell me he was going to be executed for preaching the gospel.

Q. So his – he's telling you his belief that he's going to be executed for preaching the gospel?

A. Correct.

Q. All right. And you don't think he's malingering about that?

A. It's my opinion that he's not malingering.

[83] Q. All right. What records did you review in connection with your evaluation of him?

A. I would say ditto to all the records Dr. Conroy testified to, but I can probably list them again, if you'd like.

Q. That's all right. Who have you spoken to in connection with your evaluation?

A. I spoke to Warden Jones before I saw Mr. Panetti, and I spoke with Mrs. Panetti.

Q. Okay. What are the symptoms of schizophrenia?

A. Well, there are many symptoms. In this particular case, Mr. Panetti has a history of hallucinations – auditory hallucinations, which are hearing voices that are not there. And in his particular case, he has a set of fixed delusions that date back to the 1980s that have to do with – they're typically centered around grandiose ideas about him being sort of a messiah, he's here to preach the word of God, just to save other people, and he's put himself in sort of an elevated place in this regard.

Q. Can a person who is suffering from schizophrenia without medication hold an ordinary conversation?

A. At times. Again, it depends if you're not necessarily dealing with that fixed delusional system, at times they can.

Q. Okay. Could people mis-perceive the symptoms of schizophrenia?

A. Sure.

[84] Q. In people that are unfamiliar with schizophrenia, can they mistake a person's ability to hold an ordinary conversation and conclude that they're not mentally ill?

A. Absolutely.

Q. That does happen?

A. That does – and I can give you examples in my conversation with Mr. Panetti.

Q. I was going to ask you that. Did he, at any point, to you have a rather ordinary conversation about something?

A. At times he did. We talked about Polunsky, the unit, how things are run there, schedules for him, recreation times, what does he do with his time. He knows a few of the staff members by name. In fact, he told me a little bit about each one of them. He's very much – the staff is very professional. They treat him very well, and how some of the other inmates treat the staff, and how poor he thinks that is.

He talked about pornography being recently removed from TDCJ and he feels – his delusional system gets a little bit tied up into that because, then, at that point, he said that he's had something to do with that.

Q. And at that point, the delusionary system kicks in, again, and the symptoms of the schizophrenia are then more apparent?

A. Exactly. But he was able to carry that part of the conversation fairly well. And then, when we got into the pornography that he became a little bit delusional again. He [85] started talking about how he's had something to do with that. That's part of his gospel, that what he has to do in the prison system, clean out the system. And he expressed some guilt about having looked at a Playboy magazine, and when it was that he first looked at it, and went on and on and on about his childhood. And, again, he sort of went off on a tangent.

Q. His – the looseness of association and the fact that he keeps it up for such an extended period of time, is

that one of the things that leads you to believe that he is not faking his mental illness?

A. That and the fact that he didn't seem to latch on to other symptoms that he's had in the past. For example, one of them is the auditory hallucinations. It was my impression in interviewing him that he's not experiencing auditory hallucinations. And in interviewing him, he could have certainly said, yes, I hear voices. And basically, he said, I hear the voice of God, but I hear it as a still voice within. I didn't get the sense that he was trying to tell me that he was hearing voices at this time. And, again, with a personality who's another occasion he very much down-played all of that. As he said, that was part of his past.

Q. So rather than exaggerating, he's trying to play down certain things?

A. He did not seem to make an emphasis on those.

[86] Q. And one of the things that people who were trying to fake a psychosis do is they latch on when you give them the opportunity as to supposedly hearing things and seeing things that aren't there?

A. Well, particularly what people think are the most dramatic, obvious signs of psychosis, yes.

Q. How would you characterize Mr. Panetti's mental illness?

A. In my opinion, he exhibits signs and symptoms of a thought disorder. It's been very consistent with paranoia. He was very paranoid, had a lot of fixed delusions consistent with paranoid ideation, but clearly schizophrenic is the word.

Q. What's schizo-affective?

A. Schizo-affective, it's a thought disorder that has a – an affective component such as the symptoms that Mr. Panetti exhibited in the '80s: rages, manic episodes, sleeplessness.

Q. Did he talk about his visits with Dr. Conroy?

A. He did.

Q. What did he say about that?

A. He kept calling her Dr. Connelly and I corrected him. I said, I think that's Conroy from what the warden told me. He told me that first time he wasn't very nice to her. He didn't like her very much. And then, she came back, and then, she was okay.

Q. Did he tell you about his visit with – from Dr. Parker and Dr. Anderson?

[87] A. He did.

Q. What did he say about that?

A. He seemed very paranoid about them. They thought that the fact that they came together meant something suspicious that they had something going. And the inference that he gave me was that it was something sexual between them, and that Dr. Parker was – had brought Dr. Anderson, I believe was the female, to entice him in some way. Dr. Anderson had dropped a pencil and she had reached over to pick it up, and that he was very suspicious that that meant something. They were trying to set him up to see how would he would react if he would have had a sexual response or not.

Q. All right. And in fairness, you're not saying that there is any relationship – such relationship between Drs. Parker and Anderson?

A. No, sir.

Q. That's just his perception?

A. His interpretation and perception.

Q. Did he exhibit clanging with you?

A. He did not.

Q. Did he exhibit loose association with your name?

A. Absolutely. He had all sorts of associations to my name, had me write down my name, talked about what it meant. And he told me about every other Susan or Susana that he's come in contact with in his life, going way back to early adolescence.

[88] Q. All right. In your opinion, does Mr. Panetti know that he is on death row?

A. Yes.

Q. Do you believe that he's aware that he is to be killed?

A. Yes.

Q. What's your basis for this opinion?

A. We discussed it and, again, he's very familiar with how the death row system operates. He keeps up with other inmates who are being executed. As Dr. Conroy says, he knows when somebody goes and comes back, it means that they had a stay of execution. And he talked a lot about praying for those people, and how he's there to save

them, that he has to pray – pray the gospel and try to save souls of people who are there on death row.

Q. Okay. Does he know that he killed his wife's parents?

A. Yes.

Q. Did he say why? Did he explain that to you in any fashion?

A. In a rambling sort of manner, he did. And it was difficult to get him to talk about it, but he did. He basically told me that he was insane back then, that he had been healed, that on that date, he went over there and he talked about detail – a lot of sort of circumstantial details about going over – driving over the bridge, changing his clothes, shaving his head. He told me he went there to free [89] his wife and daughter and that he believed that they were hostages, and that he went and tried to – in that his intention was not kill his in-laws, that he loved them, that he saw them as his parents, that he was really sorry. And that he worried a great deal about that he had been told that his daughter might have witnessed the murder, and he felt really bad about that and he wasn't sure if that was the case.

Q. Is this a rational understanding of the killing of his in-laws?

A. I believe so. Yeah.

Q. Well, is it a rational understanding in the sense of he was killing his in-laws with some belief of hostages being involved?

A. Well, hostages and, also, the – the delusional system involving Sarge that he was partly possessed by those entities, and that's what my notes reflect, also.

Q. I'll put it a different way. Is his understanding of his capital murder grounded in reality?

A. If I understand your question, no.

Q. Okay. Did he tell you why he believes he is to be executed?

A. He told me that he has been on death row, basically been put there to preach the gospel, that he's there to help and save other inmates; that there has been a conspiracy to kill him for years; and that the forces of evil, demons, devils are [90] basically set against him. And that it's a very fixed idea that he kept repeating to me about this.

Q. Did he also say they are trying to kill me to keep the gospel from being preached?

A. Yes.

Q. That is, the state was trying to kill him for preaching the gospel?

A. Correct. He said, there are good and bad people within the system. He's very split on that. He says there is good people, bad people within TDCJ. Good judges, bad judges. And it's all sort of a split between good and evil in his mind.

Q. All right. I'll pass the witness.

THE COURT: Counsel, save your cross-examination for a quarter of 2:00. Quarter of 2:00.

(Recess.)

THE COURT: You may take your seat, please, ma'am. Dr. Rosin, you understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE COURT: Ms. Dettmer.

MS. DETTMER: Your Honor, if I may address something, really quick, before we question this witness regarding what we offered as Exhibit 3. We've spoken with counsel during the break, and he waives the predicate to that and stipulates to the fact that they are the business records of –

[91] MR. HAMPTON: We have no objection to the authenticity, Judge.

MS. DETTMER: So we would move at this time to admit this exhibit into evidence.

THE COURT: All right. And that exhibit is what number?

MS. DETTMER: No. 3.

THE COURT: It is received without objection.

CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi, Ms. Rosin. My name is Tina Dettmer with the Attorney General's Office.

Were you in the courtroom during Dr. Conroy's testimony previously?

A. Yes, I was.

Q. Okay. So you – I want to – before I go into that, I'm sorry. I want to talk to you about your qualifications. Now, do you have any specific qualifications in forensics?

A. No, I do not.

Q. Okay. And have you performed competency examinations before?

A. Not for execution.

Q. Okay. What about competency to stand trial?

A. Three.

Q. Okay. Now, you testified that you reviewed several [92] records, but I'm not sure if you actually specified specifically what those records were. Do you mind doing that for us now?

A. I'll be glad to.

Q. Thank you.

A. I've reviewed hospital records, dating back from 1986 from Mr. Panetti, at different hospitals. I'm trying to recall this from memory. From Kerrville VA, from a hospital in Cumberland, from a VA Hospital in Wisconsin, from

the Waco VA, from a treatment center called Starlite Treatment Center. I also reviewed different doctors' reports, Dr. Simes, Dr. Cunningham, Dr. Parker and Anderson's report. There were several affidavits written by the first Mrs. Panetti, and a statement by Sonja, the second wife.

There were also transcripts of a trial of – I'm trying to think of the two competency evaluations that he had his competency trials, the first and the second one, with the testimony. And I may be leaving something out.

Q. His medical records from TDCJ?

A. Yes, ma'am, I did those, too.

Q. Okay. In speaking of the competency trial and the reports of Dr. Lee Simes, can you point to anything in your review of that record that indicates that the illness that Panetti reportedly exhibited then is more severe now, according to your report?

[93] A. It sounded from those records, if I recall them correctly, that he was exhibiting some of the same delusional thinking, grandiose ideation, pressured speech, and so forth. So it was very similar.

Q. Very similar. And are you aware of the results of the competency exam –

A. Yes.

Q. – in 1994? Can you tell us what that was?

A. He was found – on the second trial he had for that he was found competent.

Q. Okay. Now, you testified that you were in the courtroom earlier when Dr. Conroy testified, so you heard us go through all the medical records of his mental health history, correct?

A. Correct.

Q. And you heard us talk about all of the indications in the record that indicated that there were doctors at certain times in the past several years that he's been at TDCJ that have indicated that they believe that he was malingering, correct?

A. Correct.

Q. But your opinion is today that you didn't think that he was?

A. At the time I saw him, I did not think he was malingering.

Q. Okay. Based on your interview with Mr. Panetti, would you say that he was concerned about his execution?

A. He did not express a lot of concern. He said that [94] whatever happened would happen.

Q. Okay. You testified earlier that he kept up with the executions of other people, that he was aware of what was going on?

A. Absolutely, yes.

Q. Okay. Did he discuss his stay with you, his stay of execution that he received earlier?

A. No.

Q. Did he discuss the stays of other inmates that they had received?

A. I think he discussed the stay of one particular person. I can't recall the name of the inmate.

Q. Now, you testified that Panetti believes that he is going to be executed in order to prevent him from preaching the gospel, correct?

A. Correct.

Q. Now, you were also in here when Dr. Conroy testified that Panetti understands that the state is claiming that they're executing him for his part in the murders that he committed back in 1992; is that correct?

A. Correct.

Q. Do you agree with her assessment on that?

A. Can you repeat the question?

Q. Sure. Do you agree with Dr. Conroy's assessment that Panetti understands that the state's reason for executing him [95] is because of the murders he committed in 1992?

A. I would agree with that, yes.

Q. So he just doesn't believe the state essentially?

A. Correct.

Q. Now, you talked about when you first went into your interview with Mr. Panetti that he was suspicious, correct?

A. He appeared that way, yes.

Q. And what did you do to allay his suspicions?

A. I showed him the documents that I had with me, which were copies of the forms that we had submitted to the Polunsky Unit for people to be able to come and see him. It showed my name, it showed Mr. Hampton's name, and his signature, and basically I explained to him why I was there.

Q. Okay. So once you explained to him that you were there on behalf of his attorneys, he – that sort of helped allay his suspicions?

A. He seemed more comfortable, yes.

Q. Talking to you.

Your Honor, I think that's all I have at this time.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Dr. Rosin, about him becoming more comfortable when you mentioned his lawyers, did he recognize my name at any point?

A. No, he did not, know who you were.

Q. Okay. Did he refer to Mr. Gross?

[96] A. No.

Q. Okay. Was there any talk about Marine Corps?

A. We were – actually, after I introduced myself, he basically went into the hat deal with me. Started talking about the Navy hat so –

Q. All right. You've done three competency evaluations; is that right?

A. Correct.

Q. How many evaluations of people suffering from severe mental illness have you conducted?

A. Many.

Q. Hundreds?

A. Hundreds, yes.

Q. All right. Pass the witness.

MS. DETTMER: We have no further questions, your Honor.

THE COURT: Is it "Rose-in" or –

THE WITNESS: Rosin.

THE COURT: Excuse me. Dr. Rosin, are you opposed or in favor of the death penalty for capital cases?

THE WITNESS: In favor of the death penalty when its appropriate.

THE COURT: And when you see the same symptoms in the records, of course, with your training, because they are made generally, or you assume they're made by generally incompetent [97] people that make those.

THE WITNESS: (Moving head up and down.)

THE COURT: In your business of attempting to evaluate and give opinions, you utilize those opinions?

THE WITNESS: Absolutely.

THE COURT: Counsel asked you a question and – because it's an important question, and that is, you have no way of determining the depth of the mental illness today as contrasted with the depth of the mental illness prior to '92?

THE WITNESS: Correct.

THE COURT: Do you have any more information than – and I have it down as Dr. Conroy. Did y'all say it's Conway?

MR. HAMPTON: No, sir. "Roy."

THE COURT: Okay. Conroy. Do you have any more information other than Dr. Conroy's statement she believed that the records would infer that there have been no psychotic medications taken by Mr. Panetti at least for a couple of years?

THE WITNESS: From what I could gather from reading all these records, it appears that he did not take medication from 19 – from the mid-'90s, I believe, 1995 or so.

THE COURT: I think I recall where he refused to take the medication, at some point in time, but I didn't run short on it.

THE WITNESS: What he stated to me is that on April [98] Fool's Day of 1995, he had a revelation. He refused – he was healed, and then, from then on, he refused to take medication.

THE COURT: Well, that's his statement.

THE WITNESS: That is his statement. And I could not see from the record that he took medication from the mid-'90s on.

THE COURT: That would be, of course, after his conviction and sentence.

THE WITNESS: Yes, sir.

THE COURT: Do you know what communication, if any, Mr. Panetti had about your coming or who you were?

THE WITNESS: I understand that Mr. Hampton told me that a letter had been sent to him. Mr. Panetti did not seem to be aware about it at the onset. He didn't recognize Mr. Hampton's name. And I showed him those documents that I had to show him that, in fact, I had been sent by his attorney. And he looked at the documents, actually.

THE COURT: But you don't know what communication he may have had either with the lawyers, or the family, or anybody?

THE WITNESS: That's correct.

THE COURT: All right. Thank you. Any further questions, counsel?

MR. HAMPTON: No, Judge.

MS. DETTMER: No, your Honor.

[99] THE COURT: You may step down.

* * *

SETH W. SILVERMAN, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Are you a licensed psychiatrist?

A. Yes, sir.

Q. Are you board-certified in forensic psychiatry?

A. Yes, sir.

Q. Who certified you?

A. American Board of Psychiatry and Neurology.

* * *

[103] Q. All right. The Court's already heard about the symptoms [104] of schizophrenia. As a medical doctor, what can you tell us about what happens in the brain with people who suffer from schizophrenia?

A. Well, it's –

Q. Generally?

A. I think most people – great majority of people agree that's a biological illness, it's hereditary. There's some biochemical parameters in terms of different levels of neurotransmitters. There are some people who espouse the fact that there's a specific decrease in the amount of brain material in different areas of the brain. I think that's a little bit controversial as to which areas. But most people agree that there are specific tissue problems when you have schizophrenia.

Q. Tissue in the brain?

A. Yes, sir. And there are ventricles where your cerebral spinal fluid kind of get circulated through your spinal cord, and there's a dilation now. There's not one specific thing that's identified with it, but it's clear there are abnormalities that are – and, also, with CAT scans when you look at circulation through the brain that there are abnormalities in blood flow. There's not one thing that's specific for it. And you can't do these tests and say, well, this person has schizophrenia, but there are clearly abnormalities that are being increasingly recognized with the [105] illness and the genetics are indisputable: 50, 80 to 90 percent penetrance in individuals who have parents who have schizophrenia.

Q. Is there brain shrinkage associated with schizophrenia, too?

A. In some schizophrenics, yes, sir.

Q. If you took a picture of a normal person and compared it to someone who was suffering from schizophrenia, would those two pictures look differently?

A. Probably. Like I said, there's not 100-percent correlation. It's not diagnostic. But there's a – a lot of data that shows there are tissue differences in people that have schizophrenia versus normals.

Q. Have you interviewed Mr. Panetti?

A. Yes, sir.

Q. When did you do that?

A. Last Friday, which would be the 3rd.

Q. How long did you spend with him?

A. I think it was over two and a half hours, but I'll say two and a half hours.

* * *

[109] Q. Does he know that he killed his wife's parents in your opinion?

A. Well, I went over this with him about five times because I think its ability. And the answer is he thinks that another individual named Sarge killed his in-laws, and at that time, Mr. Panetti was insane. I asked him that same question a number of times, and that was the best rendition I could get. This was the most logical rendition I could get, assuming I could piece together his thoughts, that it was Sarge, that he was insane at the time, and he takes no personal responsibility for that at all. Despite the fact that I told him, the best of my understanding, you killed your in-laws, we went over and over and over it, but that's as far as he went with it.

Q. Okay. In your opinion, is that a rational understanding of his killing of his in-laws?

A. Absolutely not.

Q. Would you say his understanding of this capital murder is grounded in reality?

A. He doesn't believe or doesn't understand that the reason [110] he's going to be executed is because he killed his in-laws. He doesn't believe that that's the reason.

Q. What did he tell you specifically regarding his understanding why he is to be killed?

A. Because he preaches the word of the gospel. He's very persistent about that.

Q. And that's consistent with all of the records that you've reviewed, the same reasoning?

A. Yes, sir.

Q. Okay. And your review of the records, too, to be real specific about it, includes psychiatric records from 1981 until 1992; is that right?

A. Yes, sir.

Q. And that reflects 14 different hospitalizations in six different hospitals, doesn't it?

A. Well, I didn't count them that way, but I'll take your word for it. A number of hospitalizations. It's chronic, it's repetitive, and it's consistent.

Q. It's before the killing of his in-laws?

A. Absolutely.

Q. In your opinion, does he perceive or appreciate the connection between his killing of his parents-in-law and his execution?

A. No.

Q. What is your basis for that opinion?

[111] A. It's what he told me repeatedly, and I've talked to other people.

Q. Well, could he have been faking it?

A. It's possible.

Q. Okay. Do you think he was?

A. Very clear that he is not faking that. Absolutely.

Q. Why not?

A. I think it's been discussed is I've never had that experience, and I've evaluated hundreds, thousand people. The first thing you want to decide is, are they malingering. I cannot imagine anyone having that intensity, that kind of specificity, grandiosity, and that kind of tangentiality with regard to their thoughts who could continue to do that, repeatedly, over that length of time. I just have never seen it. And I've evaluated a lot of people. I can't imagine anybody doing that.

So I'm very clear about my sense that he was not malingering.

Q. Did your review of the records also include the Waco VA Hospital?

A. Probably. I don't remember the specifics.

Q. Well, if someone gets hospitalized in the VA hospital and the VA hospital decides they're not malingering, what does that tell you?

A. Well, they have a higher sensitivity and, many a times, [112] tend to overemphasize that aspect of someone's illness.

Q. In other words, they're more sensitive to – they're looking for people to be malingering?

A. Absolutely. They're worried about – well, because it's true, and because there are people who are looking for three hots and a cot, for free medical care. The more times they get admitted, the greater likelihood that they're going to be disabled. There's a lot of money riding on that. There

are a lot of reasons to malinger. And I've actually seen a number of people at the VA. Like one guy threatened to stab me when I told him I didn't think that he was mentally ill. So there's a good reason in the veteran system to see a lot of people who are manufacturing symptoms for reasons other than the fact that they are truly mentally ill.

Q. Okay. Can you give us briefly just a couple of the – of examples of his train of thought that he expressed when you saw him last Friday?

A. Well, when we first met, besides the fact – I put my card up on the – my business card up on the glass so he can see who I am, and he kind of peered at it. And I'm not sure I can quote him, or I don't know if I want to quote him, but he separated about whether I was a Christian or saved, and Jesus, and Christ, and Jews, and how I had the word of God inside of me and the spirit, and just went on and on and on about that stuff. And that went on for about ten or 20 minutes because I [113] wouldn't tell him whether I was a Christian or not. And that was a recurring theme, although at the end, he did say that I did have the word of God inside of me. He made sure I wasn't God, but that I could speak for the word of God.

Q. Okay. And you don't think he's faking any of that?

A. There's no question in my mind.

Q. Did he mention any of the lawyers? Or what did you tell him about the purpose of your visit?

A. I told him that I was here to see whether or not he was competent to be put to death, whether he understood why he's being put to death. And I explained to him that there was no confidentiality, that everything we talked about could be just told to a report – or put to

testimony, and that he didn't have to speak to me. It was totally up to him. I'm not sure he understood that, but I wanted to explain that there weren't selective things that he could isolate as appropriate to the Court to understand.

Q. Okay.

A. And to answer your question, he did not mention any lawyers, and I did not bring up the specifics. And he did ask me which side I worked for, and I told him I was retained by the defense counsel, but he questioned me repeatedly. I don't think he really understood what that meant.

Q. Pass the witness.

[114] CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi, Mr. Silverman. My name is Tina Dettmer. You've been in the courtroom for the last two doctors who testified, have you not?

A. I think Dr. Silverman.

Q. I'm sorry. Dr. Silverman, I apologize. Were you in the courtroom when Dr. Conroy testified?

A. Yes, ma'am.

Q. And you were in the courtroom when Dr. Rosin testified?

A. Yes, ma'am.

Q. Okay. I want to start where you left off. You said that you didn't think that Panetti had any understanding of what it meant when you said you worked for defense counsel; is that correct?

A. That's what I said, yes, ma'am.

Q. Okay. Is that what you said? I don't want to misrepresent your testimony.

A. I don't remember. I get kind of nervous, but I think that's consistent with my understanding.

Q. Okay. But before you said that, you said that he asked you who you worked for, which side you worked for?

A. Correct.

Q. Okay. Why would he ask you which side you worked for if [115] he didn't understand what that meant?

A. Maybe he's learned to ask that. I guess what I was saying was he didn't understand that I was retained by the defense. He didn't seem to have a response like he did on that.

Q. But he asked you which side you worked for?

A. That's my recollection.

Q. Okay. Now, you talked about who you spoke with in formulating your opinion, and you mentioned an interne with the Texas Defender Service; is that correct? You also mentioned a Karin Erinhart, I believe – I believe you said her last name was?

A. Eberhart.

Q. Eberhart. I'm sorry. And some family members of Mr. Panetti's?

A. Yes, ma'am.

Q. Would it be fair to say that each of these individuals are friends or family, or people who are concerned about whether or not Mr. Panetti is ultimately executed?

A. Absolutely.

Q. And so, they may have some sort of bias –

A. Absolutely.

Q. – in their opinion of him?

With schizophrenia, is it possible that a person who has schizophrenia can still be competent to be executed?

A. Oh, I think most people are. Most schizophrenics are, so [116] the answer is yes.

Q. So the fact that Mr. Panetti has schizophrenia does not automatically disqualify him from being competent to stand – or, I'm sorry, competent to be executed, correct?

A. I want to make sure I answer it "Yes" or "No." Yes, you can have schizophrenia and be competent to be executed.

Q. And you said you reviewed the competency trial from 1994?

A. Yes, ma'am.

Q. And I know we've already talked about this with the past two experts, but can you point to anything in your review of the records or in your evaluation of Mr. Panetti

that indicates that his illness or mental illness is more severe now than it was back in 1994, when he was adjudicated competent?

A. I don't have absolute recall, but when they asked the different competency question ten years ago?

Q. Uh-huh.

A. I don't know. So I probably couldn't have if I read the whole thing again specific to that question, so I don't know.

Q. Okay. So you can't tell us whether or not his illness is severe, or less severe, more severe than it was back in 1994?

A. I suspect it's more severe, but I don't have a lot of data for me to substantiate that because he hasn't been medicated since '95. He had had some medication I reviewed at that time. There's some real specific records at that time where [117] he was logical and coherent, and he asked – I guess it was a psychiatrist to come back and see him two or three times –

Q. Okay.

A. – because he enjoyed it. So at that point in time, it looked like to me – and I can't tell you specifically in the trial but around that time, he was more lucid, coherent and logical when he took his medication. I suspect that since he had not taken his medication, his illness has progressed more significantly. But, no, I can't specifically say one thing in the record addresses that. But if you look at the whole thing, I would say, yes, he probably is more severely ill right now.

Q. If there were people who would testify that he is, in fact, lucid at times, you know, when he wants to be like he was in 1994, would there be any difference now?

A. I'd like to hear the conversation what the content is about. I think it's contextual. I think you can understand a lot of things on a certain level. If you ask for the underpinnings, it would be a little difficult. I think some people can drive. They may believe that people are out to get them. That's not an issue till they see a kind of car that really disturbs them. I've seen it all the time. So I would really like to see the conversation and the content, the specifics, and what the understanding was to be able to address that question.

[118] Q. So what disturbed Mr. Panetti in this case would be discussion of his execution, possibly?

A. Well, I'm sure that's one of the things. There are a lot of other things that don't make sense, but that's one thing.

Q. Okay. We talked a little bit about – or you talked a little bit about malingering. Earlier, is it important to you in determining whether a person is malingering to look at their history?

A. Absolutely.

Q. Okay. Did you look at his prior mental health records from TDCJ?

A. Yes, ma'am.

Q. Did you notice in there that there were several doctors, over a period of almost two years, who consistently noted that they thought he was faking or exaggerating his

illness in order to get a certain treatment or a certain medication?

A. I don't know that they gave the reason for it, but I do know there was at least one evaluation that just said malingering. It had no attention to detail or mental status examination to substantiate it. I don't remember someone specifically saying, he's doing this, he's lying because he wants to get this. He knows what he's doing. I don't remember that.

Q. If the records were to reflect that, would that cause you to – some concern in evaluating him currently?

[119] A. Concern? The stuff that was done six years ago, eight years ago, ten years ago, I think it needs to be a little bit closer to the point. I'd like to see those qualifications and how sophisticated the evaluation, documentation. You're asking me, I think, too broad a question for me to answer it specifically.

Q. Okay. Let me try again. And this may be too broad.

If a patient has in the past – let's hypothetically assume that a patient has in the past malingered in an attempt to get medication, or some other incentive, would that be important to know when you are interviewing him for competency when he has a huge incentive to malinger, would you not want to know that?

A. I'd like to know everything. Yes, ma'am.

Q. And would that not be important to your evaluation?

A. I can't tell you the importance until I look at all the other information, but it would be helpful to know.

Q. Okay. Now, you testified that Mr. Panetti has no rational understanding of why he's being executed, correct?

A. I don't know if I said – I don't know if you said, does he have a rational understanding.

Q. I'm sorry. Does Mr. Panetti know why he's going to be executed?

A. I don't think that he does, no.

Q. Okay. Does he know why the state says it's going to [120] execute him?

A. I'm not sure. I was listening to Dr. Rosin. I don't have an answer to that.

Q. Okay.

A. Actually, let me – can I qualify that?

Q. Sure.

A. I did ask him that specifically. I'm just recalling it. He did say that he is being put to death because he preaches the word of the gospel, and that's what they want him – that's why they're going to do it. He didn't – he doesn't associate, in my opinion, to the death of his in-laws.

Q. Okay. And so, if Dr. Rosin and Dr. Conroy were here earlier and testified that they believe that he is, at least, capable of understanding that the state says it's going to execute him because of the murder of his in-laws, would you agree or disagree with that statement?

A. Well, I have a different opinion. That's their opinion.

Q. Okay. I think we'll pass the witness, your Honor.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Very briefly. Doctor, the phrase that he – or the question that he asked you is, which side do you work for, when you first – at some point during your interview; is that right?

A. I think it was something to that effect. I told him I had [121] been retained by the defense to evaluate him, and I believe after that, he asked me which side did I work for, something to that effect.

Q. All right. Could that question have reflected upon his delusionary belief system about the people he encounters?

A. Well, it's possible. I don't – I'm not so sure he understood what the question meant because his answer – or my answer didn't seem to affect anything at all. He kind of went on from there. So I can't answer that.

Q. Among the records that you reviewed, do you recall reviewing Dr. Simes' 1992 report from the competency trial or his testimony?

A. Vaguely.

Q. Okay. Well, Mr. Panetti was given certain medication for his competency trial that included Perphenazine. What's that?

A. Perphenazine is a first-generation anti-psychotic.

Q. All right. What is – what's a Temazepam?

A. It's a mild tranquilizer.

Q. How about Amitriptyline?

A. It's a first-generation antidepressant.

Q. If he was given two to four-milligram tablets of Perphenazine, three times a day, one to two 15-milligram tablets of Temazepam a day, two-milligram tablets of Benztropine a day, and four 25-milligram tablets of Amitriptyline a day, what would – what effect would those [122] drugs have on someone who is not schizophrenic?

A. I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out. And when you wake up, you can't think. You have kind of like the lights on, nobody's home. It just doesn't happen. And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. The maximum dose in the PDR is 24 milligrams. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

Q. And that indicates to you that his schizophrenia is long-standing, at least till 1992?

A. Absolutely.

Q. All right. And to your knowledge, he's not on any medication today?

A. That's correct.

Q. Pass the witness.

MS. DETTMER: No further questions, your Honor.

THE COURT: Doctor, you said, and I wrote down, the defendant doesn't believe, then you said understand the reasons for the execution. You've been in the courtroom the whole day.

[123] THE WITNESS: (Moving head up and down.).

THE COURT: You need to say "Yes" or "No."

THE WITNESS: Yes, your Honor. I'm sorry.

THE COURT: And I've heard two psychologists, at two separate occasions, indicate in their conversations with Mr. Panetti he indicated to them that the state says they're executing me because of these murders, but they're really executing me because I'm preaching the gospel, et cetera. You heard that testimony?

THE WITNESS: Yes, your Honor.

THE COURT: Now, as I understand it, you didn't have a similar conversation with him, that is, he didn't say the same thing to you?

THE WITNESS: Correct.

THE COURT: When you asked him as to why he thought they were executing him, then he told you the religious presentation?

THE WITNESS: Yes, your Honor. I have a – I repeatedly questioned him about, you killed these people and the state wants to put you to death for that, and he dismissed it, said that's when Sarge was there and saying – and that they were going to put him to death because he was preaching the word of the gospel.

THE COURT: I take it at three different times, with three different individuals, it wouldn't be unusual for you to [124] get differences in his conversation?

THE WITNESS: No, sir.

THE COURT: A seriously mental ill person that had the type of medications that you've talked about in the early '90s, no doubt that a person who can still function – and we know he functioned because you read the transcript of the trial.

THE WITNESS: Yes, your Honor.

THE COURT: And you're telling me in your belief, because of the medication he was taking, that's a clear indication to you that he had a mental illness at that time and was, I believe you said, extremely psychotic?

THE WITNESS: Yes, your Honor. The fact that he could function after getting that medication speaks to the fact that he has a severe mental illness.

THE COURT: So anybody that has a severe mental illness where they are on medication – psychotic medication, if they were to accomplish criminal acts justifying a jury to give them the death penalty, and then, they just stop their psychotic medication for the several years it's going to take to run the appeals, what, in your opinion, would that result?

We just have a hospital for all people who had mental illness who refused to take their medications and – it's not a silly question. It's an important question. It comes out kind of silly, but it's not. You can't force a person to take [125] medication. And, obviously, somebody mentally ill who's on medication of that nature, when he stops, he's going to have some delusions. At least, I'm getting the impression that in the professional sense they will. Then, whether or not they have lapses in rationality or lapses in irrationality, the medication will certainly lead to delusions on occasion, wouldn't it?

THE WITNESS: The lack of medication?

THE COURT: Yes, sir.

THE WITNESS: The lack of medication would, depending on where they are were in the illness, will most likely be to a more severe refractory kind of illness. That's also sometimes part of the illness. Bipolar people don't want to take medication, schizophrenics don't want to take their medication, outside of whatever reasons there might be.

THE COURT: I understand. But most bipolar people are not facing capital punishment.

THE WITNESS: That's true.

THE COURT: All right. Now, I take it there's no question, in your mind, from your conversation with him that he knows that the state is trying to put him to death.

THE WITNESS: Absolutely, he knows that, in my opinion.

THE COURT: Any further questions?

MR. HAMPTON: No, Judge.

[126] THE COURT: Any further questions?

MS. DETTMER: No, your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you, your Honor.

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[126] GEORGE PARKER, called by Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. STEWART:

Q. . . .

Dr. Parker, can you tell us what your occupation is?

A. I'm a licensed Ph.D. psychologist in private practice here in Austin.

Q. And how long have you been doing that?

A. How long have I been doing that? On a full-time basis, since 1977.

* * *

[132] Q. Approximately how much time did you spend interviewing Mr. Panetti?

A. Interviewing him, I would estimate a little over an hour. Approximately an hour.

Q. Okay. Can you tell me how the interview with Panetti began? Did you greet him?

A. Not well. As Dr. Silver – I can't remember what – said that he is an unusual person. And it started off with him attempting to take charge of the situation by inquiring about our – I say "our." Dr. Anderson and I were together – about our religious interests, and the nature of our faith, and that sort of thing.

Q. Did he return your greeting? Did he say, hello, how are you?

A. No. He wasted no time on anything like that. He got right to the religion. And we – I mean, it surprised us a little bit. I mean, I've talked with a lot of folks in my day, and I've never had anybody start off quite like that. And perhaps the easiest, simplest way through that would have been to answer his question, but it seemed inappropriate, and we weren't there to discuss our religion. So we explained that to him and discovered later that that apparently had really ticked him off, and he held that against us, and he, I [133] think, wasn't going to answer our questions because we had not answered his.

And later on, in an effort to try to break the log jam, we went ahead and confessed that, yes, we're Christians and – but it seemed to matter not at all by then.

Q. Okay. When you said that it came back to haunt you, do you recall specifically what he said?

A. I have written it in our report kind of the things that he was saying to us in that regard. As best I can recall, when it became clear to me that he wasn't going to answer the questions that we were there seeking answers to was when Dr. Anderson had asked him – well, I mean,

did you murder somebody, or why are you in prison here, or something to that effect. And he indicated that – it was kind of like – oh, and why won't you answer the question? I mean, just yes or no. I mean, did you murder someone?

And his response was something about, well, you remember the question that I asked you and – I mean, it became clear that he remembered the beginning of the session, and it was on his mind while we were talking. And since we had not cooperated with him, then he was not going to cooperate with us.

Q. And did that conversation lead you to conclude that he could carry on a logical conversation, that he could complete a train of thought?

[134] A. Well, that's a really good question. I think he is capable of carrying on a much more logical conversation than – certainly than he did with us, but that he has some significant psychological problems. I mean, I think only a fool would dispute that. But he – I just think he's more aware of what's going on and what he wants to do in certain situations than sometimes it appears.

But it's awful hard to have a, what did you say, logical conversation with him. I think it's very, very difficult to – for that to happen.

Q. Okay. In light of Mr. Panetti's lack of cooperation, were you able to reach any conclusions about his competency to be executed?

A. Ask me that one more time.

Q. Since Mr. Panetti was uncooperative during your interview, he refused to answer your questions, were you

able to reach any conclusions on his competency based on the interview alone?

A. No. I think it would be very unprofessional, unethical for me to render an opinion based on the interview alone. It became necessary to rely on other data.

Q. Okay. So in light of that, how do you form an opinion when a person you're evaluating won't cooperate with you?

A. Well, I mean, what I do, and what we did in this case, was rely on what collateral information we could gather. And, for [135] example, I sought, and was able to get, access to copies of some of his correspondence, letters that he wrote to people from the prison. And I also spoke with Captain Miller, and as did Dr. Anderson, and – to kind of get a feel for what Captain Miller saw as going on with Mr. Panetti. Those are the two collateral information sources I recall right now.

Q. Okay. Did you review any other information in preparation for making your report of your testimony here today?

A. Oh, yes. I read all the records that the previous witnesses have talked about here, the medical records, the VA records, the Starlite records, and so on and so forth. And, you know, the records from the penitentiary from his history while he's been at the penitentiary.

Q. Okay. Excuse me one minute, your Honor. Is Exhibit 3 still up there? Do you have a copy of what's been marked as Respondent's Exhibit 3?

A. I do.

Q. Okay. Which has already been admitted. Those are Panetti's medical or mental health records from TDCJ. Did you review those records?

A. Yes.

Q. Okay. Did you find anything of significance in those mental health records that aided you in your evaluation of Panetti?

A. Well, these records, of course, go back to the mid-'90s [136] and – I mean, '95, '96, '97, along in there. And it's quite clear to me from these records that the mental health workers, the psychiatrists, counselors, and so on, were having quite a time trying to figure out what was going on with Mr. Panetti. And the – there's a good deal in these records that indicates that they didn't think that he was really schizophrenic, after having been around him, and interviewed him, and interviewed him and had conferences, and so on. And there are multiple references to their concern that he's malingering his presentation and it's – I mean, there are – there's probably at least a couple of dozen references to that sort of thing in these records.

Q. Okay. We need Exhibit 4.

MR. HAMPTON: The letters. No objection.

MS. STEWART: Let the record reflect that I've handed counsel an identical copy of Respondent's Exhibit 4.

Q. (BY MS. STEWART) Dr. Parker, can you tell me what that is that I've just handed you?

A. Well, it appears to be a copy of the – copies of his – of Mr. Panetti's letters that were provided to me from the penitentiary.

Q. Okay. Your Honor, Mr. Hampton has already agreed to stipulate the authenticity of these records; therefore, we move to admit them as Respondent's Exhibit 4.

THE COURT: Hearing no objection, they're admitted.

[137] MS. STEWART: Thank you.

Q. (BY MS. STEWART) Dr. Parker, what role did these letters play in your evaluation of Panetti?

A. Well, that the bottom line of these letters to me indicates that there are times that Mr. Panetti can be socially appropriate. I mean, the letters are letters that are – you know, that you might receive from someone who's a relative, or a friend, or something like that. Perfectly clear that they also reflect his preoccupation with, you know, with religion, and God, and the bible, and so on.

You know, but he talks about things, asks about the welfare of people he knows, you know, makes inquiry about what's going on outside the walls, those kinds of things.

Q. So they do reflect some ability of Panetti's to produce lucid thoughts and socially appropriate thoughts?

A. At times, yes.

Q. Is it likely that an individual would be able to compose coherent letters such as these but be incapable of understanding their reason for his execution?

A. I would find that hard to believe.

Q. Can you tell me why?

A. Well, I mean, it's – he can be reasonably clear and lucid at times, so I don't know why in the world he couldn't understand what the state is up to here and what this is all about.

[138] Q. Okay. Dr. Parker, can you identify that packet of documents that I just gave you?

A. Yes. All I know is that it's called the death packet.

Q. Okay. Did you rely on that information that were referencing as Respondent's Exhibit 6 – your Honor, we'll be providing the witness to authenticate that later. Did you rely upon that information in forming the opinions found in your report?

A. I relied on this to the extent that it seemed clear to me – and I also had talked with Captain Miller about this – seemed clear to me that Mr. Panetti at least knew that he would be dead. It doesn't tell me that he knows why he is to be executed, it doesn't go to that, but he is going to be dead seems clear. And it refers to last meal, and what you want done with your belongings, and do you want a lawyer to help you with a will, and all that kind of thing. So that's what it does for me.

Q. And does it also indicate that Panetti is able to understand direct questions and to respond appropriately when he chooses to do so?

A. Well, sure. It strongly suggests that to me.

Q. Okay. Did you speak to anyone at the prison regarding Panetti in your evaluation of him?

A. Well, I reviewed all the records over there. But, no – I spoke with Captain Miller.

[139] Q. Okay.

A. I remember that.

Q. Did you find his – in that conversation with Captain Miller to be informative or helpful in your analysis?

A. Yes. And, in fact, as I said, Captain Miller is the one who mentioned this and eventually provided a copy of this for us. And it was my sense from what Captain Miller was saying that even though Mr. Panetti is unusual and, in fact, is known in the unit as "the preacher," he understands what's going on and understands what – why he is to be executed, and so on.

Q. Okay. Given all this information, what conclusions have you reached?

A. Well, the conclusions I reached are set out in my report. I can read those to you.

Q. Yes, please.

A. My conclusions while they're stated as my opinions on the last page of my report, there are five of them.

Q. Okay.

A. The first one is that Mr. Panetti is able to understand direct questions about his past as well as his present situation. And he could answer questions about relevant legal issues regarding his execution if he were willing to do so. Number two, Mr. Panetti consciously chose not to answer our interview questions about his past and his

present, as well as questions about legal aspects of his execution. Number three, [140] Mr. Panetti deliberately and persistently chose to control and manipulate our interview – our interview situation by deflecting the interview into religious topics.

Number four, Mr. Panetti knows that he is to be executed and that his execution will result in his death. And, number five, although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason that he is to be executed.

Q. So, in fact – well, let me rephrase. Let's begin with, is Panetti mentally ill?

A. I think so.

Q. But that mental illness, whatever it may be, doesn't necessarily preclude his ability to understand why he is being executed?

A. In my opinion, no.

Q. So it is reasonable to expect that Panetti could understand why he's being executed if he's told?

A. Yes.

Q. And when is Mr. Panetti able to function in a coherent fashion? When is he able to communicate effectively?

A. I don't know if it's all the time, and I don't believe it's none of the time. It's somewhere out there in the middle. And I couldn't assign a number to it.

Q. Is it fair to say that he is able to communicate logically when he chooses to do so?

[141] A. I think he can a lot more than he – well, certainly than he did with me, and that he appears to do at times with others.

Q. Okay. In preparation for your testimony today, did you review Dr. Cunningham's report?

A. Yes.

Q. Okay. Do you dispute Dr. Cunningham's observations?

A. His observations? No.

Q. Okay. But, yet, you disagree with his assessment of Panetti. Can you tell us why?

A. Well, I haven't looked at it for a while. It seems to me as though what Dr. Cunningham, who I respect highly, is saying is that Panetti is just too crazy to understand the reason that he is to be executed, and I don't dispute the observations that Dr. Cunningham reports. I just have a different opinion as to whether Mr. Panetti is capable of understanding.

Q. And you're basing your opinion on the fact that he – that there are these letters and that indicate that he can communicate when he wants to, and with your conversations with Captain Miller – or your conversation?

A. All of those things, yes.

Q. Do you need some water, Dr. Parker?

A. I might use some here. Is that okay, your Honor?

THE COURT: That's why it's there.

[142] A. I'm an old man. My throat gets dry.

THE COURT: Well, I think probably everybody's a little dry. We'll take 15 minutes.

(Recess.)

MS. STEWART: I have a personal matter. Could we talk off the record, your Honor?

(At the Bench, off the record.)

Q. (BY MS. STEWART) All right. I know you're never supposed to say this, but I really do only have a couple of more questions. Pick up where we left off.

Just because Mr. Panetti is preoccupied with religion and may even, at some level, genuinely believe that he is being executed for preaching the gospel, does that render him incapable of understanding why the authorities have ordered his execution?

A. Well, in my opinion, no.

Q. Okay. You have concluded to a reasonable degree of psychological/psychiatric probability that Mr. Panetti understands why the authorities have ordered his execution or that he could?

A. Psychological. I don't know what he understands, but that he is capable of understanding, and that it would make sense to me to believe that after all this time, he would understand. I mean, that's the best I can do on that.

Q. Okay. Thank you very much. I pass the witness.

[143] CROSS-EXAMINATION

BY MR. HAMPTON:

Q. Good afternoon, Dr. Parker.

A. Hi.

Q. You and I know each other?

A. Yes, we do.

Q. And you understand that I'm representing Mr. Panetti here today?

A. Yes.

Q. I'm going to ask you questions. I'd like to ensure that if you can answer the question "Yes" or "No," would you be willing to do that, answer the question "Yes" or "No," if you can?

A. I'll do my best.

Q. All right. And if you can't, just say, I'm sorry, I can't answer that with a "Yes" or "No." Does that sound like a fair way to proceed?

A. Let's try that.

Q. All right. You've done competency evaluations in the past, right?

A. Yes.

Q. And you know, if I understand, what is meant that a person to have a factual as well as a rational understanding about why he is to be killed, right?

[144] A. Why he is to be tried, yes.

Q. Well, when you were examining Mr. Panetti for competency to be executed, are you telling the Court that you were not trying to evaluate whether he had a factual as well as rational understanding of why he is to be executed?

A. Yeah. I was trying to evaluate that.

Q. With that standard?

A. I don't know I'd use those words at that time. But yeah, with that idea in mind that he understood that he had a – that he had an understanding. I think that would have to be my answer.

Q. Would it – so is it – are you saying that its unimportant that his understanding is irrational?

A. No, I'm not saying that.

Q. Okay. So while you were evaluating him for his understanding for competency, you were seeking to determine whether he had a factual as well as rational understanding. Is that true?

A. I would have to agree with that.

Q. All right. Fair enough.

You were the Director of Psychological Services, Chronic Pain Management Program at Shoal Creek from 1977 to 1983, right?

A. Yes.

Q. And then, you were the Director of Psychological Services, [145] Chronic Pain Management Program at St. David's Hospital from 1983 to '89, right?

A. Yes.

Q. And in 1992, you were involved in a workshop entitled Psychological Issues in the Treatment of Chronic Pain Patients, true?

A. I'll take your word on the date on that, yes.

Q. All right. Have you reviewed your own CV any time today?

A. Well, I looked at it.

Q. All right. Well, do you remember in '93, you presented to the Texas Association of Physical Therapists convention The Psychological Dimensions of Chronic Pain as a presentation?

A. I remember the presentation.

Q. In '94, you made a presentation of Mind in a Painful Body to the Southwestern Association of Disability Examiners?

A. Yes.

Q. In '95, you presented – had some different topics beginning in '95, Investigating Professional Incest to the Texas Board of Examiners/Investigators. Do you remember that?

A. Yes.

Q. And in '98, you presented to the Austin Criminal Defense Lawyers Association, Forensic Psychology in Sex Abuse Cases. Do you remember that?

A. I remember the presentation.

Q. All right. So you did do that?

[146] A. Yeah.

Q. You did make that presentation?

A. Yes.

Q. And in 2000, presented Assessing Sexual Offense Recidivism Risk to the same group, right?

THE COURT: You mean to the same group of lawyers?

MR. HAMPTON: Uh-huh. Yes.

A. I believe so.

Q. (BY MR. HAMPTON) All right. And chronic pain management, you agree, is a totally different field from dealing with people with schizophrenia, true?

A. Well, there are a few schizophrenics with chronic pain but – and some of them were in our program.

Q. But they're big –

A. So I wouldn't say they're totally different, but they're not identical, that's for sure.

Q. Well, I don't mean the people themselves that you're evaluating, but the field of expertise is different from chronic pain management to evaluating schizophrenics?

A. I mean, I wouldn't disagree with that. They're not the same things.

Q. They're not the same things. You noted in your written report to Judge Ables that it was especially important for you to rely upon collateral data to help establish a

basis for your professional opinion. You said that, didn't you?

[147] A. Yes.

Q. It's crucial in psychiatric evaluations that you as the evaluator, that you be objective, true?

A. Well, sure.

Q. And collateral data would provide some objective basis for whatever opinion you would have, true?

A. I would agree, sure.

Q. That would avoid a purely subjective opinion on the part of an evaluator, true?

A. It would help that, sure.

Q. And it would also help – as you say, help avoid just speculating about someone's state of mind, true?

A. Yes.

Q. Okay. And you're not here to offer speculations to this court?

A. I don't think so.

Q. Are you? Well, is that a "No"?

A. That's a "No."

Q. Okay. And you'd agree, too, that it's important as a psychologist to demonstrate to the Court the process through which you arrived at your opinion, true?

A. Insofar as possible, sure.

Q. Well, otherwise, the Court is simply left to choose which experts to believe, wouldn't you agree? Without some explanation of the process by which someone arrives at a [148] conclusion, the fact-finder, the Judge in this instance is left to – just to pick which opinion he wants to agree with, true?

THE COURT: Why don't you let me worry about that, and let's get to some meat.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) When you evaluated Mr. Panetti, you wrote a note to – you made your notes available to us, didn't you?

A. I did.

Q. Do you think you'd recognize your own handwriting?

A. Well, probably.

Q. You would hope so? All right. I haven't marked it yet. Well, I put a sticker.

THE CLERK: Okay. 1.

Q. (BY MR. HAMPTON) I'm going to show you what's been marked Plaintiff's Exhibit 1. See if you recognize it.

MS. STEWART: May I see that or is –

MR. HAMPTON: Yes, you will if he identifies it.

A. Yes.

Q. (BY MR. HAMPTON) Is that your handwriting?

A. Yes.

Q. Do you know what it is?

A. Yes.

Q. Is that a note to yourself?

A. Yes.

[149] Q. Okay. I'd offer the note. Plaintiff's Exhibit 1.

MS. STEWART: Okay. No objection.

THE COURT: Plaintiff's 1 is received without objection.

MS. DETTMER: Do you have a copy?

MR. HAMPTON: (Moving head up and down.).

Q. (BY MR. HAMPTON) You also wrote a letter to the Texas Department of Corrections before you saw Mr. Panetti; isn't that true?

A. Yes.

Q. And in that letter, you told them that you would need to be able to – in order to conduct a reliable examination that you'd need to observe Mr. Panetti closely and adequately for a period of several hours, true?

A. Yes.

Q. And you stayed for about an hour?

A. About an hour with him.

Q. Is it important to spend more time in order to make a more reliable evaluation?

A. Well, I can't answer that "Yes" or "No." I mean, it would be a good idea to be able to spend maybe three to four hours talking with an individual. That was my plan. But things ended at approximately an hour because they weren't going anywhere.

Q. He didn't attempt to leave the room?

[150] A. What did you say?

Q. He didn't attempt to leave the room, did he?

A. I don't think so, no.

Q. He remained in the room?

A. Yes.

Q. He didn't stand mute?

A. He didn't?

Q. Stand mute? Say nothing?

A. Oh, no.

Q. He responded in some fashion to your questions?

A. Well, let's say he responded. I'm not sure it was always to my questions. But he was – he talked most of that hour, yes.

Q. During your interview, you asked him, why are you in prison, and he said, in order to preach the gospel of the living king, didn't he?

A. Yes.

Q. So he answered your question, didn't he?

A. That question, I think he did.

Q. Okay. You asked him, you are on death row right now. Why? And he said, they don't want me to preach the word of God, right?

A. Right.

Q. So he answered your question then, too, didn't he?

A. Right.

[151] Q. Did you share all of the information that you had with Dr. Anderson?

A. As far as I know.

Q. Okay. And are you confident that she shared all of her information with you about Mr. Panetti?

A. Again, as far as I know.

Q. You're competent about that?

A. Am I confident about that?

Q. Yes. Do you think that Dr. Anderson withheld any important information about Mr. Panetti to you?

A. Well, that's two things there. One, as far as I know, we shared everything. Now, whether anything was withheld or not, I don't know, but it certainly wouldn't have been intentional.

Q. Well, she wouldn't withhold anything extremely material or significant about Mr. Panetti to you, would she?

A. I wouldn't think so.

Q. Okay. You reviewed the execution packet?

A. Yes.

Q. Exhibit 6. And you noticed that, first, he says that he does not desire a will?

A. I recall that.

Q. And then, he writes in his own handwriting, I desire a will?

A. Yes.

Q. He lists his spiritual advisor as Jesus Christ, Holy [152] Spirit, God, in the blank that's meant for the chaplain, or the priest, or minister?

A. I recall that.

Q. Okay. Then, he checked, I do not desire a will. Do you remember that?

A. Yes.

Q. And then, he checks all three boxes – he initials all three boxes that his disposition of his estate is too complex for a simple will, that he has an existing will, and that he needs the services of an attorney to write a will. Do you remember that?

A. I do.

Q. Okay. Then, he checks, again, yet, another sheet that he does not desire a will, right?

A. As I recall, there are inconsistencies in what's checked and what's written there, yes.

Q. And the religious orientation section, he identifies himself as preacher of, quote, good news. And that the following individual is my spiritual advisor, Jesus Christ is

Holy Spirit, God, again, the spiritual advisor being the priest, or whoever. Do you remember that?

A. Yes.

Q. And there's nothing in this packet that indicates that he knows why he is to be executed, right?

A. I would agree with that.

[153] Q. Okay. If you go over some of the letters that he wrote in Respondent's Exhibit 4, April 6th letter to his parents, he writes Karin, the visitor from Switzerland, quote, took it upon herself to arrange travel with a devout witch and the young oh 36-year-old man is one who – the one whom promotes this Mark Robinson has shot me with a blow gun darts, threw boiling water on me, and has led a group of devil worshipers whom caused me to lose a lot of skin on my face from the chemicals they spray on me. So please e-mail, call her say, no, I shall not come out to visit because of the witches, exclamation mark.

Would you consider that a normal socially appropriate thought?

A. No.

Q. Okay. Later in the letter, he says, there is no brotherhood of common death row inmates. There are enemies here of God's country that I oppose, and I shall not join with them. I hope she understands I want to see her, but the spirit of God says not to compromise with evil.

Do you think that's a normal, socially appropriate thought?

A. I don't think so.

Q. April 9th letter to Peter writes that, quote, I am under a lot of attack by the dungeon and dragon Columbine High School type. So artwork is difficult to do twas a blessed time when [154] I did your portrait, a peaceful day, very little quiet time here. Much, much evil ones whom do not repent. So sad.

Would you agree that that's not a normal, socially appropriate thought?

A. It's an unusual kind of a thought.

Q. Well, in his letter – three-page letter in this – in Respondent's 4 is the letter to Karin, which he tells her, quote, each day and night, I contend with these anti-Christian forces in prayer. Yet, when they spray mix chemicals and laugh, I just turn them over to God. Now I think of the weeping icon at – icon at a Greek orthodox at Blanco, Texas. What a time that was to see the weeping icon the preparation, et cetera, to be allowed into the area of the weeping icon.

Is that a normal, socially appropriate thought in your opinion?

A. No, I don't think so.

Q. In the April 5th letter to Karin, he writes – and I'm skipping ahead. But it's no mail on Friday or Saturday and people who assumed I received a great bunch of new pen pals assumed incorrectly. I have not one more new regular pen friend, a Navy pilot wants to visit and I said in uniform would be good for folks, people to see he is four years my junior.

That's – would you agree that that's not a normal, socially appropriate thought?

[155] A. It's an unusual thought.

Q. All right. Yet, you wrote in your report to Judge Ables that these letters reflected normal, socially appropriate thoughts. Isn't that what you wrote?

A. I'm referring to other parts of the letters than what you've been reading.

Q. Well, did you read the letters from the recipients?

A. I don't recall letters from recipients. Do you have some letters from recipients?

Q. No. But my question is, how can you tell if they're appropriate or not if you don't know what letters he was responding to?

A. Well, it's a judgment call, I guess.

Q. You spoke with Captain Miller, right?

A. Yes.

Q. Before or after you interviewed Mr. Panetti?

A. After.

Q. So you hadn't decided at that point whether or not Mr. Panetti was competent after your interview, right?

A. Well, I mean, I was still gathering data.

Q. Okay. You hadn't come to any conclusion that he was competent after you had interviewed him?

A. I hadn't come to any final conclusion, no.

Q. Okay. And Captain Miller calls him "preacher man"?

A. He didn't call him that. He said that Mr. Panetti is [156] called that on the unit.

Q. How long did your conversation with Captain Miller last?

A. I don't know. Twenty minutes, maybe a half an hour, somewhere along in there.

Q. All right. You took notes, didn't you, on – from your conversation with Captain Miller?

A. I don't recall.

Q. Do you know whether Captain Miller knows the standard for competency to be executed?

A. I don't know.

Q. Do you know how much experience he has in evaluating people with schizophrenia?

A. I don't know.

Q. Do you know what level of education Captain Miller has obtained in order to make any sort of a competency evaluation?

A. I don't know.

Q. Does he know how to test for malingering?

A. I really don't know.

Q. How did Captain Miller determine Mr. Panetti rationally, as well as factually, understood he was going to be executed?

A. You'd better ask Captain Miller. I don't know.

Q. You're not claiming that he's qualified for making that kind of determination, are you?

A. I'm not claiming that he would represent himself as a professional qualified to do that sort of thing.

[157] Q. You also reviewed the affidavits of Dr. Cunningham and Professor David Dow, right?

A. Are you referring to Dr. Cunningham's report?

Q. Yes. And the – your report lists the items that you have reviewed, that you told Judge Ables you reviewed. And one of those items which you've listed, besides the review of letters, Major Miller, you also wrote that you looked at the motion to determine competency to be executed and then, the motion seeking an order setting out protocol for conducting a reliable competency evaluation of Scott Panetti. Attached to that motion were two affidavits, one from Professor Dow and the other from Art Cunningham.

Are you saying you don't remember ever seeing Professor Dow's affidavit of his encounter with Mr. Panetti?

A. What I'm saying is I don't recall that name. I mean, I have reviewed all of those materials, but I don't remember that particular name.

Q. I noticed that your list of materials that you reviewed go back only as far as 11-6, 1992; is that right?

A. If that's what it says, that's what it was.

Q. Okay. You don't recall reviewing any records from 1981 to 1992?

A. I don't recall that. No.

Q. Do you recall Dr. Arambula's 1997 report?

A. Well, I have read a report from Dr. Arambula.

[158] Q. All right. That's not listed, actually, in your report to Dr. – I mean, to Judge Ables, is it?

A. Do you want me to check and see or –

Q. Well, I've checked it out. I can tell you –

A. Well, I'll take your word for it.

Q. Okay. But you've read Dr. Arambula's report at some point?

A. I have.

Q. Okay. And you saw the interview of Mr. Panetti in February '97 for two and a half hours, right? Do you remember that? Do you not remember anything –

A. You want me to read his report or –

Q. Yeah. I'm –

A. I don't recall how many hours he saw him.

Q. Let me – I'll skip right ahead. It seems like I'll need to.

You don't really remember too much from that 1997 report here today, do you?

A. I remember reading it. And I remember that Dr. Arambula was concerned about Mr. Panetti, and I don't know how many hours he talked to him, or anything like that.

Q. Well, I'm going to offer Dr. Arambula's report into evidence now. I think we've got an agreement to do that.

I'll ask you to take a look at Plaintiff's Exhibit 2, and see if you recognize this as Dr. Arambula's report – as a [159] copy of Dr. Arambula's report.

A. That looks like it.

Q. Same one you reviewed?

A. It looks like it.

Q. All right. Offering Plaintiff's Exhibit 2 now.

MS. STEWART: No objection.

THE COURT: 2 is received without objection.

Q. (BY MR. HAMPTON) I'll let you have that exhibit. You can read off of it. Just look that over for one brief minute and I'll ask you: From that report you can see that he interviewed Mr. Panetti in February 1997 for two and a half hours?

A. Yes.

Q. He also reviewed Panetti's medical files from Starlite Village Hospital, Kerrville Hospital, the VA Waco Hospital, Tomah VA Hospital, and Cumberland Memorial Hospital, right?

A. Yes.

Q. And you knew that Panetti was first hospitalized in 1981 from that report?

A. Yes.

Q. And by 1986, he was hospitalized, again, after suffering from delusions and hallucinations, right?

A. Right.

Q. He buried his family's furniture that year and believed that the devil was in the furniture, right?

[160] A. Right.

Q. So as early as '86, Panetti's schizophrenia is being expressed in religious terms, right?

A. Well, yeah. Well, he was diagnosed then with chronic undifferentiated schizophrenia.

Q. A diagnosis you don't disagree with?

A. I have no basis to agree or disagree with it.

Q. You noted that Mr. Panetti had visitors there at the prison?

A. I recall that he did, yes.

Q. And you noted all their names?

A. I don't recall all the names, no.

Q. You never spoke with his family?

A. That's right.

Q. You never spoke with his friends?

A. That's right.

Q. You never spoke with his visitors?

A. Did not.

Q. You never looked at Panetti's cell?

A. Did not.

Q. Or examine his bibles?

A. No.

Q. You didn't list Dr. Wolfgang Selck as a collateral source in your report to Dr. Ables, did you? It's not on here.

A. Evidently not.

[161] Q. Or Dr. F.E. Seale, right?

A. No. I have seen his report. I do remember that. But I'll take your word as not listed there.

Q. Okay. But so, you did see Seale's report?

A. Wait a minute. Say that name one more time.

Q. Seale, S-E-A-L-E. There's another doctor named Simes, in case you're –

A. I saw that.

Q. Okay. So you know that he, along with Dr. Seale, independently believed him to be sincerely suffering from schizophrenia?

A. Yes.

Q. Okay. Now, you wrote in your report to Judge Ables, and have said here today, that his letters contain text which reveals that Mr. Panetti is able to form and verbalize normal socially appropriate thoughts when he chooses to do so. And I want to focus on that last phrase. Chooses to do so or is able to do so?

A. It may be some of both.

Q. All right. Okay. And you recognize that schizophrenia is a brain disorder?

A. Yes.

Q. Okay. A brain disorder isn't a choice, is it?

A. No.

Q. Your conclusion seemed to assume that his inappropriate [162] responses were due to some conscious choice of his. Is that a fair statement, that that was an assumption?

A. I think at times, yes.

Q. Okay. Your conclusion kind of assumes that he's rational there, fair enough?

A. I think at times, he's capable of expressing appropriate thoughts and ideas, yes, if that's rational.

Q. Well, that's – I'm saying that you made that assumption, though. What is your basis to differentiate between a conscious choice of his to do that as opposed to a symptom of a brain disorder that makes him unable to do that? Where's the distinction?

A. Well –

Q. Other than just you sort of eyeballing him?

A. Well, it really wasn't based on the eyeballing of him. It was based on some parts of these letters, which we just went through and talked about.

Q. Okay. Parts of the letters. Captain Miller –

A. Yes.

Q. – right? Okay. I take it that you felt like spending more time with him would be unproductive?

A. It – yeah, it would have been.

Q. Didn't he agree to take a psychological test if – as he referred to him, with Marine Corps Gross, or his parents agree?

[163] A. He indicated that he might be willing to do that if that was – if he was told to do that by Mr. Gross.

Q. Okay.

A. It was my clear understanding that he'd already been told to do that.

Q. He'd already been told to do what?

A. To cooperate in the evaluation.

Q. Okay. Who do you think told him that? Do you know?

A. Mr. Gross.

Q. Are you assuming that or do you know that?

A. At the moment, I don't recall exactly what but it was – I think it was more than a mere assumption.

Q. You don't dispute that while Panetti, in your eyes, might have been competent six months ago doesn't mean he's competent here today, right?

A. I'd have to agree with that.

Q. All right. And even in your report, you never said that Mr. Panetti had a rational, as well as factual, understanding of the reason why he is to be executed?

A. No, I've never said that.

Q. All right. Pass the witness.

RE-DIRECT EXAMINATION

BY MS. DETTMER:

Q. Mr. Parker, I just want to clarify a couple of things, Doctor.

[164] Your conversation with Major Miller, was he in any way, shape or form holding himself out to be an expert?

A. Oh, no. No.

Q. He was just giving his general impression based on his interaction with Mr. Panetti?

A. Exactly. His observation based on years of experience, working with folks in prison, absolutely, and lots of observations.

Q. And you didn't rely on his opinion as an expert, did you?

A. Of course not.

Q. It was just one of many factors that you considered in reaching your conclusions?

A. I paid attention to it and considered it, yes.

Q. And, Doctor, you were actually appointed by the trial court, weren't you, in this case?

A. As far as I know, yes.

Q. A person with a brain disorder with schizophrenia, do they have choices?

A. Do they have choices?

Q. Can they make choices?

A. Oh, of course.

Q. Can they make decisions?

A. Of course.

Q. Is it possible that a person with schizophrenia can fake or exaggerate their symptoms?

[165] A. Certainly.

Q. Do you think Panetti has any kind of motive in this case to exaggerate or fake his symptoms? Do you think execution –

A. Well, I don't know that he is for sure, or anything, but I mean, he probably doesn't want to die. Most people don't. Most people don't want to be executed.

Q. Does hyper-religiosity make a person incompetent?

A. No.

Q. Can a person believe in God, and the Holy Spirit, and Jesus Christ, and still understand that they're going to be executed and why they're going to be executed?

A. Of course.

Q. Now, in reference to the letters that he read to you about the Dungeons and Dragons and the commotion that was going on around him and his cell, do you – are

you aware of the fact that people actually play those games in and around Panetti?

A. No. As a matter of fact, I'm not.

Q. So if somebody were to testify that they were, in fact, inmates who played the games of Dungeons and Dragons around him and that disturbed him, that would be a logical thing for him to share in a letter, would it not?

A. It would be an accurate report, yes.

Q. And it's not unusual for someone who is religious to be disturbed about satanic activity, which some would associate with Dungeons and Dragons?

[166] A. Often times.

Q. And, ultimately, Doctor, your inability to form an ultimate conclusion to know for sure that Panetti is competent and that he absolutely understands why he's going to be executed – the reason that you can't make that decision is because he was uncooperative in your interview; is that correct?

A. That's basically it. He wouldn't answer the questions.

Q. And that makes it rather difficult for someone in your position?

A. Makes it real hard.

Q. Okay. Pass the witness.

RE-CROSS EXAMINATION

BY MR. HAMPTON:

Q. In your report, Doctor, to Judge Ables, you said that Captain Miller said that he knows what's going on, right?

A. Do you want me to look for that and confirm it, or shall I take your word?

Q. Well, go by your memory. I mean, what did you gather from Captain Miller other than Captain Miller's opinion that he knows what's going on?

A. Well, that would have been it and in the death packet.

Q. Mr. Panetti told you, when you asked him, you're on death row right now, why, and he answered to you, they don't want me to preach the word of God, right?

[167] A. Right.

Q. Would you agree that if he is telling the truth, if that's a genuine reflection of his delusion as to why he is on death row, you'd agree that he's incompetent to be executed?

A. If that's the only thing that he is capable of understanding, I would agree with that.

Q. All right. You read Article 4605 of the Code of Criminal Procedure, right?

A. Is that the one that refers to –

Q. (Moving head up and down.)

A. Well –

Q. Competency to be executed?

A. I read through it as a layperson.

Q. Well, the article refers to reports of the experts. You and Dr. Anderson wrote a joint report, right?

A. We wrote a joint report, yes.

Q. With a singular opinion, right?

A. Right.

Q. And who really wrote most of that, or all of it?

A. It was pretty much of a 50/50, maybe a little more on my part.

Q. Okay. How much did you bill?

A. How much did I bill?

Q. Yes.

A. The last ledger amount I can recall was somewhere around [168] $10,000.

Q. And that was about $360 an hour, wasn't it?

A. That's exactly $360 an hour.

Q. You went down on the 24th of that month to see Mr. Panetti, right?

A. Is that the day we saw him? We would have gone down on the 23rd, most likely.

Q. I think you – your report says you saw him on the 25th. So –

A. No. We saw him on the 24th.

Q. Okay. So you went down on the 23rd, right?

A. Right.

Q. And you stayed with Mr. Panetti for about an hour?

A. That's right.

Q. And the Court paid for the whole day, didn't it?

A. Right. Well, that's kind of misleading the way you're asking me. I mean, we were there most of the day in the penitentiary. We were not with Mr. Panetti all day.

Q. All right.

A. All right. When was the last time that you and Dr. Anderson agreed or, rather, disagreed about an evaluation of someone?

MS. DETTMER: Your Honor, I'm going to object. I'm not really sure how this is relevant.

THE COURT: Well, he's just trying to show bias and [169] interest. I don't – I'll overrule the objection. You may answer.

A. Well, the last time we disagreed was when she was wrong. I don't recall when.

Q. (BY MR. HAMPTON) How do you spend your clinical days, your days with your patients? What kind of clientele do you have?

A. Well, I mean, some days I'm seeing patients, and some days I'm in jails, and some days I'm in lawyer's offices, and so on. When I'm seeing patients, I'm, you know, in the office, talking to them.

Q. What journal articles did you review regarding competency to be executed?

A. Well, I don't recall having reviewed any journal articles real recently here. And when I started doing this work, I –

THE COURT: This is re-redirect.

MR. HAMPTON: All right.

MR. HAMPTON: I'm really done. Thank you.

MS. DETTMER: Nothing further, your Honor.

THE COURT: You may step down.

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[170] your full name, and spell your last.

THE WITNESS: Steven Miller, M-I-L-L-E-R.

STEVEN MILLER, called by the Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. WEAVER:

Q. Good afternoon, Mr. Miller.

A. How are you?

Q. Have you been in the courtroom today and listened to the testimony?

A. Yes, ma'am.

Q. Okay. Just as an initial matter, there's been some reference to your title as Captain. Would you clear that up for us and give us your title?

A. My correct title is Major of Correctional Officers.

Q. Okay. And where are you presently employed?

A. I'm employed at Texas Department of Criminal Justice, Polunsky Unit.

Q. And how long you been employed there?

A. I've been employed with the agency for 13 years and at Polunsky Unit for the last year.

Q. What are your current duties at the Polunsky Unit?

A. Major of Correction Officers, he is the highest ranking uniformed security officer. He oversees the daily supervisory functions on the unit. Daily functions include making sure that the everyday functions of the unit are being met, [171] security-wise. We also initiate reports, documents, rules and regulations that pertain to that particular facility.

At the time when I was over death row, we – it also included the in-processing of new death-row offenders onto the Polunsky Unit; the preparation of execution packets; and the escorting of offenders scheduled to be executed on a particular date.

Q. Okay. And could you explain to the Court what exactly an execution packet is?

A. Execution packet is a state document that is used – two weeks prior to an offender's execution date, he is

brought into the office. It basically outlines or prepares the offender's final situation. He sets up his witnesses that he wants to view the execution. If he has any property that is outside of his control that he would require a will, lawyers, their address, telephone numbers, in case we need to contact them; who or how the body, in case the execution takes place, is going to be disposed of. Is it going to be picked up by a particular family member, or is it going to be left in the hands of TDC to bury on their own property.

We also talk about how he's going to dispose of his personal property, if it's going to be donated, or if a family member is going to pick up the personal property, his – any kind of money that he has in his trust fund account, where is it going to go to. Final meal request, what he's going to [172] request the day of his execution that he wants to eat, and plus clothing size. There's also a page dealing with the chaplaincy. It talks about his denomination, any kind of aliases that he goes by, or nicknames that he goes by, and if he wants any spiritual advisor.

Q. All right. And what is your standard procedure when you prepare an execution packet for a particular inmate?

A. Well, what we do on a day of it?

Q. Uh-huh.

A. All execution packets are prepared fourteen days prior to the offender's execution. Like I said earlier, the offender's escorted at the time to my office on what we call a Twelve Building, which is death row on the Polunsky Unit. Brought into the office, usually it's going to be myself, a lieutenant, and we'll have two correctional officers that have escorted the offender down.

To alleviate a lot of the – I say pressures that the inmate might have because being two weeks out from his execution. We remove the hand restraints. He sits up next to the desk, right across from me, and we try to create a relaxed atmosphere where, you know, he can relax because of the fact what he's preparing. What we do is – and the execution packet is not done in any particular order, even though it has an A, B, C, D.

We start out, I'll read each page by page. We'll do [173] one page at a time. I'll read it to him, ask him if he understands. I'll give him a pen. I hand him that piece of paper. He'll write it out, and we'll do that for every page. Once we complete all that, then we'll verify it, make sure that he understands and that everything is correct.

Q. And then, do you type up a form from that?

A. Yes, ma'am. All the information that the inmate has written on the execution packet, we hand it over. It is transferred onto computer and then, it's computer-generated. Once that computer generation is done, we hand it back to the offender, he reads over it to make sure everything's true and correct and there's no mistakes. Once that's all done, he's going to sign, it's going to be witnessed by myself and the lieutenant. And once that's – everything is complete, we'll fax that copy to Huntsville before noon of the execution date and to Mr. Dretke's office.

Q. Okay.

A. Okay.

Q. And did you prepare Scott Panetti's execution packet?

A. Yes, ma'am.

Q. And when did you do that?

A. I believe January 22nd of this year.

Q. Okay. And in preparing his execution packet, did you follow the standard of procedure that you just described?

A. Yes, ma'am.

[174] Q. Did Mr. Panetti fill out the form himself and then, go over it with you?

A. Yes, ma'am.

Q. And he filled out that form in your office?

A. Yes, ma'am.

Q. And who all was present when he filled it out?

A. Myself and, I believe, Lieutenant Richey was also there.

Q. Okay.

A. I can't think of the correctional officers that were probably in the office at the time.

Q. Okay. And did he eventually complete the form?

A. Yes, ma'am. We finally completed the form.

Q. And then, were you able to complete a computer-generated form?

A. Yes, ma'am, we did. We ran into some problems when it came to a particular area of that execution pack.

Q. Okay. Well, once those forms were completed, what did you do with them?

A. Once we completed them, we forwarded them to Huntsville to Mr. Dretke's office.

Q. Okay. And did you also keep a copy in your office?

A. Yes, ma'am, we keep a copy. It becomes the official records, and it goes in the inmate's file.

Q. Oak [sic]. If you'll take a look, I believe there will be a document identified as Respondent's Exhibit X there – I mean, [175] Exhibit X. What am I saying? I'm sorry. 6. If not, I have some more copies. Did you find it?

A. Yes, ma'am.

Q. All right. Do y'all have a copy?

MR. GROSS: (Moving head up and down.)

Q. (BY MS. WEAVER) If could you take a look at that for me.

A. Okay.

Q. And do you recognize that?

A. Yes, ma'am.

Q. Is it a fair and accurate representation of the forms that you filled out –

A. Yes, ma'am.

Q. – for Mr. Panetti?

A. Yes, ma'am. I'd say so.

Q. And the form that he filled out, as well?

A. Yes, ma'am.

Q. Your Honor, we'd move to have Respondent's Exhibit 6 admitted into evidence.

MR. GROSS: No objection.

THE COURT: Received.

Q. (BY MS. WEAVER) Okay. The first question I have is, was Mr. Panetti cooperative with you during the meeting to prepare his execution packet?

A. Yes, ma'am, for the most part, he was.

Q. So did he follow your instructions?

[176] A. For the most part, yes, ma'am, he did.

Q. And did he answer all of the questions on the form?

A. Yes, ma'am, he did. We ran into a situation in regards to the will part of the – on Section B.

Q. Okay. On B, one through four?

A. Yes, ma'am.

Q. Could you explain what happened with regard to that?

A. When we sat down, explained it, and, like I said, we try to keep a lax atmosphere due to the fact of what's transpiring.

Q. Uh-huh.

A. Its hard to put yourself in the position unless you're actually in that position. We started going down, I read off everything, explained what is required, what he

needs to do. As far as the witnesses, I had no problem with that. When we came down to spiritual advisor, he basically said Jesus Christ is his spiritual advisor. He doesn't need anybody else.

Section B in regards to worldly possessions, he talked about how he had – he had land in Montana, Wyoming, something to that effect, and that he probably was going to need a will. And we tried to, you know – and I'm not a lawyer, and never claimed to be one, but I told him, you know, most of the time, if you have relatives that are alive that you usually leave in possession of that. He said that he was going to break it up between his brothers, or something to that effect. He wanted [177] to break it down and give them each a section, something to that effect.

We went into – that's where he went ahead and started signing all the different sections in there.

Q. Can I interrupt you just a second?

A. Sure.

Q. And ask you, if, in fact, an inmate does express a desire to have an attorney –

A. Right.

Q. – does TDCJ provide that for him as far as preparing a will?

A. Yes, ma'am. And we did this for Offender Panetti, too, it this case.

Q. Okay.

A. Inmates that require or request a will –

Q. Uh-huh.

A. – we will contact State Counsel for Offenders, in which time they will make an appointment and come out, and they will discuss the procedures with the offender in regards to him creating a will. And that happened on this occasion, too.

Q. Okay.

A. Okay.

Q. Is this the document that you – that is here, I noticed there are several duplicate typewritten copies or computer-generated copies, if you will?

[178] A. Right.

Q. And then, there's handwritten copies?

A. Right.

Q. There's one part of the document that indicates that he desires a will, and then, later, he – there are initials saying that he doesn't. Could you explain the circumstances surrounding that?

A. Well, when we went from the handwritten portion of the execution pack to the computer-generated, while we were sitting there, Offender Panetti made a request to me and what his request was – what he got into, we had a little down time between the two. He went in to talk about how he is a cowboy –

Q. Uh-huh.

A. – from Wyoming or Montana. I can't recall. And what he was requesting was three things.

Q. Okay.

A. He requested that he wanted a pair of cowboy boots, a necklace with an anchor, and a wedding band, because he was, supposedly, supposed to get married to Ms. Eberhart by proxy, I believe it was, was supposed to get married. Basically, I explained to him the procedures, no, he wasn't going to get all of that, and then, he wanted to make a deal.

Q. What do you mean by that?

A. He wanted to bargain with me that with the fact that if I [179] gave in to his request about giving the ring, the necklace and the cowboy boots, that he would sign where he doesn't desire a will so we wouldn't have to call out State Counsel for Offenders.

Q. Okay.

A. That went on for a little while. And he made the statement about the cowboy boots a little bit more, and he was talking about how his medical boots hurt because he had a nail, supposedly, that was sticking him and that if he – he wanted to go out with a pair of cowboy boots. If he was going to be executed, he wanted to go out in comfort. And so, he made that statement. And he said if he couldn't wear what he requested, he would go out naked.

Q. Okay. And so, then, can you – does that explain why there are several –

A. Yes, ma'am.

Q. – copies of different initials?

A. Yes, ma'am.

Q. Because – could you explain why exactly how that happened?

A. Well, if we look at – and I'm looking at three – the very first one, where he's writing in his own handwriting and he signs all three, one, two and three, on the – in regards to an attorney, and a will, and stuff like that, he did that. We tried to explain it to him, again, because after we [180] computer-generated, he's going to have to initial off again.

Q. Okay.

A. Okay. Once we went ahead and did the computer generation and handed it to him and showed it to him, that's when he wrote in, Jesus Christ, Holy Spirit, God, and I desire a will. That's the first copy that we actually sent to Huntsville.

Q. Okay.

A. And that's when we called – contacted State Counsel for Offenders. When they came out, after they talked to him and explained to him that he didn't qualify for a will, they went ahead and generated one more, and that's where he signs, I do not desire a will and that's the – added to. So that kind of explains why we have so many different copies of this.

Q. Because, so my understanding is, each time you showed him a copy, if he didn't agree with everything?

A. He would write something in there and we'd have to go –

Q. Go through the process?

A. Right.

Q. Okay. So in the form containing handwritten notations rather than typewritten or computer-generated notations?

A. Right.

Q. That form Mr. Panetti filled out himself entirely?

A. Yes, ma'am.

Q. And he's the one that designated how much was in his trust account?

* * *

[181] A. We gave him a – we gave him a copy of his trust fund account. We showed him. At the time of January 22nd, 2004, the date of his execution, he'll fill out another one, signing over whatever is left, and we'll give him an updated version the day of his execution. So on the 22nd, he had $50.49, which he was planning on forwarding to Ms. Louise Panetti.

Q. Okay. So he filled that out about who he wanted this trust fund to go to?

A. Yes, ma'am.

Q. And on the form designating his witnesses under A, one through five?

A. Yes, ma'am.

Q. He filled that out?

A. Yes, ma'am.

Q. And he made the notations about who those people were?

A. The notations about who they were.

Q. On page – on the front page of – I guess it would be –

A. Shows friend, mother, father.

Q. Beside it on the fourth page is actually noted page 1, down at the bottom.

A. Okay.

Q. It says M.C. Gross, attorney of record, Yvonne Pearl Panetti, Mom, Louise J. Panetti, Jack. Do you see that where I'm talking about?

A. In his own handwriting.

[182] Q. Yes.

A. Yes, ma'am.

Q. And those are all his own personal notations and designations of who those people are?

A. Yes, ma'am.

Q. Okay. So did he appear to understand the questions on the form?

A. Yes, ma'am. We went over a lot of questioning about it in regards to if he didn't understand. But, like I said, it was explained to him and if he had any questions, he wasn't rushed. He was given a lot of time to complete and fill it out. But as far as him not knowing what is going on, no. He understood what was going on because he filled it out in his own handwriting.

Q. Okay.

A. And how he wanted it.

Q. And he was cooperative other than when he attempted to negotiate what he wanted –

A. Yes, ma'am.

Q. – to wear?

A. He was cooperative. We had a conversation in regards to, you know, him being a cowboy, and how he wanted to go out. He knew how he basically said if he was going to get executed, he wanted to go out comfortably.

Q. So he was able to articulate in his own – for his own [183] behalf, his own benefit?

A. Yes, ma'am. I'm not an expert in it, but I know what it is to talk to a man face-to-face and know that his answers are true and genuine.

Q. Okay. Did you – and in the course of your duties there on – at the Polunsky Unit, had you had any other dealings with Mr. Panetti?

A. Yes, ma'am. I've dealt with him on numerous occasions. What people – unless you actually work death row, or been around death row, you don't understand. And it's hard to understand unless you've been down there.

Inmates that receive an execution date per se, when we're notified by the Attorney General's Office of a date, what we do is they come down to the office. I personally notify them of their date. I also notify that they're going to be moved to a section that we have designated particularly for inmates with execution dates. And there's 14 cells in that section. It could be 14 inmates pending execution, or

it could be half a dozen. It just – it fluctuates depending on the court system.

Once they're down there, we make particular effort to go down there and check on their needs and their mental capacity every day. We go down there, see that if everything is going all right. They have any questions, or complaints, or concerns that we may be able to help them. A lot of them, [184] if they're close to their date, they've got a lot of concerns in regards to witness or visitation list, who could come see them two days prior to the execution, the day of the execution.

Going to the commissary. A lot of times, they will drop to 75 every two-week span and just let them go spend. We've had inmates spend up to $500 in a week's period of time just so they can do that. Phone calls to the attorneys. You know, we go out of our way to show some compassion for them, but not jeopardize security in the meantime. So we go out of our way to make daily rounds over there.

Q. All right. And so during those rounds, did you have contact with Mr. Panetti?

A. Yes, ma'am.

Q. And did you converse with him on those occasions?

A. Briefly.

Q. And was he able to maintain a linear thought in your conversations?

A. It seemed as normal as me and you talking right now.

Q. Okay. Pass the witness.

MR. GROSS: May I proceed, sir?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GROSS:

Q. Major?

[185] A. Yes, sir.

Q. Panetti's been on death row since '95. You said you've been at Polunsky Unit only a year. Did I hear that correctly:

A. Yes, sir.

Q. So from the whole time Panetti's been on death row from '95 until sometime last year, you didn't see him at all. Would you agree with that?

A. Yes, sir. I agree with that.

Q. About when did you arrive at the Polunsky Unit?

A. I arrived on the Polunsky Unit September 2003.

Q. So about a year ago today, right?

A. Yes, sir.

Q. Now, how does the table of organization work there at Polunsky Unit? How many folks are there above you at Polunsky?

A. You have senior warden, assistant warden, then me.

Q. So you're number three on the table of organization from the top?

A. Yes, sir.

Q. Now, there's a lot of folks at Polunsky, both death-row and non-death row inmates, would you agree with that?

A. Right. Yes, sir.

Q. You've got a ton of folks that are housed at the Polunsky that are not awaiting execution, or not there on death row, then you've got a few folks there on death row, right?

[186] A. Yes, sir.

Q. About how many do you have on death row?

A. At the time I believe when I left death row was 432.

Q. So somewhere over 400?

A. Yes, sir.

Q. Now, how many folks are there between you being number three and being actual guys in the trenches, if you will, that are actually there, walking the death row area of Polunsky and the other units of Polunsky?

A. I've got one lieutenant – one captain, eight lieutenants, and I think about 16 sergeants, and then, your COs, your front-line supervisors or front-line officers.

Q. Now, the front-line officers, the COs, they have regular guards under them, correct?

A. No. They are it.

Q. So these are the guys you see in the gray when you walk up there to see someone?

A. We all wear gray.

Q. These are the guys in gray without any rank on their collar?

A. Right.

Q. Okay. Now, the number of folks you said that are there walking the unit, roughly, how many COs are there?

A. In death row I probably had approximately between 175, 200 officers.

[187] Q. And that's just on death row only, right?

A. That's just death row.

Q. And that's not including the other units there on Polunsky, right?

A. Talking about general population?

Q. Check?

A. Right.

Q. Now, you personally go around and inspect the whole Polunsky Unit daily, weekly or monthly, or do you leave that to your subordinates?

A. Are we talking about when I'm over death or over GP?

Q. Both.

A. Okay. I'm assigned to general population now. There's two majors on the Polunsky Unit. You have a general population major and you have a death row major.

Okay. You have two assistant wardens, you have a general population warden, and a death-row warden. Okay. So it's split down the middle.

When I was over at death row, my main concern was death row. I had 432 inmates that I'm in charge of and approximately 175 to 200 officers. So did I make my rounds when I was on death row on a daily basis, yes, sir, I did.

Q. And when you make those – how long were you over death row, by the way?

A. I was eight months.

[188] Q. So from September '03?

A. To April of '04.

Q. Until April of '04. Now, when you make those rounds, what exactly do you do?

A. Well, I make my rounds, I'm ensuring that my officers and inmates are complying with the rules and regulations established by the agency. Okay. I go over there and I talk to inmates, because inmates are good source of information. You know, they pretty much can tell you if a certain officer or a certain activity is not being conducted in accordance with policy.

I just make my rounds and make sure that we create an environment that is healthy and livable but, also, workable for the officers, too, and according to ACA standards.

Q. Now, these guys that are on death row, they're in a cell in lock-down, correct?

A. Right.

Q. By themselves, correct?

A. Right.

Q. And that's 23 hours out of the day, right?

A. Twenty-three hours a day.

Q. And one hour they're allowed out, correct?

A. Right.

Q. Now, would you agree with me that you've never gone to Panetti's cell and had an extended conversation with him?

[189] A. No. I've been to his cell.

Q. And sat down and had an extended conversation with him?

A. No. I never sat down with him.

Q. Extended conversation with him?

A. I've never sat down with Panetti and had a long, in-depth conversation. But I have talked to Panetti while he was in his cell.

Q. Have you gone inside his cell with him?

A. No.

Q. Okay. Have you looked at his –

A. Why would I go in his cell? I mean that –

Q. Have you look at his bible?

A. No, I haven't look at his bible.

Q. Have you looked at any notations he had in his bible?

A. No, I haven't. Why would I?

Q. Now, when you saw –

THE COURT: You'd do a whole lot better just answering the questions than trying to guess why they're asking them.

THE WITNESS: Yes, sir.

Q. (BY MR. GROSS) Now, when you say you briefly saw Panetti in response to counsel's questions earlier on direct, by briefly what are you talking about briefly?

A. When we were talking about that –

Q. Filling out the packet, the death packet?

A. I talked to him approximately maybe 20, 30, 35 minutes.

[190] Q. And when you saw Dr. Parker at Huntsville, how long did you talk to him?

A. I don't know, not very long.

Q. Five minutes, six minutes?

A. Maybe ten minutes, 15 minutes.

Q. Inside Panetti's cell itself, can you describe to us what's hanging in there, or what's in there at all, or have you just looked at it from the outside in?

A. I can tell you when I was back there, policy stated there would be nothing hanging on the wall so I wouldn't – there wasn't nothing on the walls.

Q. When you talked to Panetti, would you agree with me that you were not trying to determine his competency?

A. No. That's not my job to determine his competency.

Q. You were just filling out the form with him, right?

A. Right.

Q. Thank you, sir. No further questions.

MS. WEAVER: No further questions, your Honor.

THE COURT: Apparently from your testimony, there's no doubt that Mr. Panetti knew about an execution?

THE WITNESS: Yes, sir.

THE COURT: Did you ever have any conversations with him with regard to why he's being executed?

THE WITNESS: No, sir. That was never brought up, and I mean, we had a kind of unwritten rule. Their crime is their [191] crime –

THE COURT: I wasn't suggesting that. I just was asking it. All right. So no doubt in your mind he knew he was going to die?

THE WITNESS: Yes, sir.

THE COURT: All right. Any further questions?

MS. WEAVER: No, your Honor.

MR. GROSS: No, sir.

THE COURT: You may step down, sir.

MS. STEWART: We call Terri Hill, your Honor.

THE COURT: Let's just have a seat for a minute.

MS. STEWART: Sorry, your Honor.

THE COURT: No, no, not you. I want you standing up. Tell me what we have left.

MS. STEWART: We hope to put on this one last witness today, and then, we have two witnesses. That would leave two witnesses for tomorrow, another person from TDCJ and our expert. He's unavailable till tomorrow.

THE COURT: And that is Dr?

MS. STEWART: Anderson.

THE COURT: Anderson.

MS. STEWART: Yes.

THE COURT: All right. If you'll come forward, please, ma'am. This is Mrs. Sims. She's going to administer an oath to you.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| SCOTT LOUIS PANETTI | ) | Docket No. A 04-CA-042 SS [/s/ JK] DEPUTY |
| vs. | ) | Austin, Texas |
| DOUG DRETKE | ) | September 8, 2004 |

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE SAM SPARKS
Volume 2

(Filed Nov. 15, 2004)

* * *

[4] MARY I. ANDERSON, called by the Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. DETTMER:

* * *

[5] Q. (BY MS. DETTMER) Can you tell us what you do, Dr. Anderson?

A. Sure. I'm a licensed physician in the state of Texas, and I have a private forensic psychiatric practice.

Q. How long have you been licensed in Texas?

A. For over ten years.

* * *

[26] Q. When did you interview Mr. Panetti?

A. On March 24, 2004.

Q. Where was that interview?

A. At the TDCJ Polunsky Unit in Livingston, Texas.

THE COURT: I'm sorry. The date again, please?

THE WITNESS: March 24th, 2004.

Q. (BY MS. DETTMER) Can you tell us how the interview began?

A. Dr. Parker and I walked into the room, and Mr. Panetti said, do you believe in Jesus. We sat down, I started to tell him who Dr. Parker and I were, why we were there, and Mr. Panetti continued to talk about religious comments and asked about whether we believed in Jesus. I explained that we were court-appointed to evaluate him for competency to be executed, that what he said can be used against him. And he continued to make religious statements including he stated, you think you've come here for one reason, you're here because Jesus brought you.

Q. Okay.

A. Went on from there.

Q. Okay. Were you able to evaluate Mr. Panetti's competency based on that interview?

A. I did evaluate him the best I could, but I also looked at available information in the jail, in the prison, reviewed other records. So I have opinions based on that evaluation, but as far as a firm conclusion of whether he's competent to [27] be executed or not is not something I have a conclusion about.

Q. And why is that?

A. Mr. Panetti was not very cooperative with the evaluation. His responses were very complex, but they were not direct answers. So he would not directly state – when I asked him, have you been convicted of capital murder, he wouldn't answer that question directly. Or why are you being executed, he wouldn't answer that directly.

Q. Okay. Now, you're telling us that he was uncooperative. Can you give us any examples from your interview with him that indicates that it was a deliberate choice not to cooperate?

A. Yes. Mr. Panetti appeared to be, actually, very, very intelligent. He responded to questions in abstract ways, but that made a lot of sense. He told us that we were there to destroy, and basically discussed that he has accepted the Lord and that we need to accept the Lord and –

Q. Let me ask you this, Dr. Anderson. At any point during the interview, did you become frustrated at his refusal to answer questions?

A. Yes.

Q. And did you ask him why he would not answer your questions?

A. Yes.

Q. And can you tell us what he responded?

A. Yes. I asked him why he did not answer questions [28] directly. To give me a "Yes" or "No" answer when I asked him whether he was convicted of capital murder, and he responded, do unto others as you would have them do unto you. Do you remember the first question I asked you?

Q. Okay. Now, what was first question that he asked you?

A. Do you believe in Jesus.

Q. And did you respond to that question?

A. I did not.

Q. Did Dr. Parker respond to that question?

A. At some point, Dr. Parker did respond and said that we were Christians, but I never answered that question.

Q. Did Mr. Panetti know that you did not personally answer that question?

A. Well, he was there, yes.

Q. So when he said – when you asked him directly, why won't you answer my questions and he responded, do unto others as you would have them do unto you, what were you able to extrapolate from that?

A. Well, it sounded to me like he was saying, if I wasn't going to answer his question, he wasn't going to answer my questions.

Q. And would you consider that a logical organized thought?

A. Yes.

Q. And in your interview you talked about how Mr. Panetti continually brought up religious references?

[29] A. Yes, he did.

Q. In doing so, were those references – did they appear disorganized?

A. No.

Q. Can you explain?

A. Yes. For example, I asked him – or Dr. Parker actually asked him, why are you on death row? And he talked about for having that coin of Cesar. And he gave the description of people trying to tempt Jesus and trick him and whether they were going to have to pay their taxes or not.

Q. Uh-huh.

A. And Jesus' response was a comment of whose head is on this coin, give to Cesar what is Cesar's; give to God what is God's.

Q. Uh-huh.

A. And then, later – so I took that as he was saying we're trying to trick him. We're trying to destroy him. We're trying to trick him into answering this question if he answers this question.

Q. So even though he's answering questions with biblical references and biblical responses, they're on some level logical responses to your question?

A. Yes. And, actually, there was another reference later where we asked, before he began preaching, why was he on death row, and he said, ah, look at that coin, referring – it [30] seemed to me to, there we go again, trying to trick him, to say the reason he's being executed.

Q. Okay. So based on your evaluation of Panetti, overall did you find his thought process organized?

A. I think that his answers made sense and there were organized responses. He often went off on tangents and would appear to avoid responding by going into religious material that he had memorized, or start singing songs that he had memorized. So it's organized, but it's, also, tangential and avoidant and not direct.

Q. And based on your evaluation and your review of the records in this case, did you get an impression as to whether that avoidance was deliberate?

A. It appeared very deliberate.

Q. Did you ever ask Mr. Panetti if he understood why he was going to be executed?

A. I did.

Q. What was his response?

A. I asked him a number of times, but ultimately, he talked about his belief that people were wanting him to be executed for preaching. And I can quote that, if you'd like.

Q. So, essentially, he was telling you that he was being executed to prevent him from preaching the gospel?

A. Yes.

Q. In your opinion, does that render him unable to understand [31] why he's being executed?

A. No.

Q. Why not?

A. Well, I think one can have a belief that there is – everything has a purpose, and I think he may believe that he is now there for a purpose, which is to preach the bible, and that if he's executed, then he is being stopped from doing so. But his capacity to understand the bible, to understand history, ~~movies,~~ other things that he referenced, tells me that he has the capacity to understand the facts of why he's being executed.

Q. So, in your opinion, he has the mental capacity to understand that the reason the state is executing him is because he killed his in-laws; is that correct?

A. Yes.

Q. Do you believe that a diagnosis of mental illness is important to the determination of competency?

A. I think that it's relevant, but it doesn't either make somebody competent or incompetent. It's certainly relevant.

Q. It could be diagnosed schizophrenic or schizoaffective disorder and still be competent; is that correct?

A. Yes.

Q. So the bottom line is, in your opinion, you could not make a determination – an ultimate determination of competence in this case; is that correct?

[32] A. That's correct.

Q. But you can determine that based on everything that you've reviewed and based on your evaluation that he has the ability to know why he's being executed?

A. That's my opinion.

Q. Okay. I'll pass the witness.

CROSS-EXAMINATION

BY MR. HAMPTON:

Q. Dr. Anderson, my name is Keith Hampton. I'm going to try to ask you a few questions, and I'd like to see if you'd be willing – if you could answer the question "Yes" or "No," if you'd be willing to do so, and if you can't, say, "I can't answer that with a 'Yes' or 'No.' " Does that sound like a fair way to proceed?

A. Yes.

Q. Both you and Dr. Parker were strangers to Mr. Panetti when you saw him, true?

A. Well, I can't answer that with a "Yes" or "No." I have to –

Q. Okay. You'd never seen him before?

A. As far as I recalled, I had never seen him before. You told me today that I had, but I did not know that I had seen him before. So as far as I knew, we were strangers.

Q. And you're saying you don't remember now either?

A. No. I don't ever remember having seen him before. But if [33] Dr. Coons testifies that I was there, then I wouldn't doubt that.

Q. Okay. You've done a lot of competency examinations, competency examinations to stand trial, right?

A. That's correct.

Q. You're not board-certified in forensic psychiatry, true?

A. I am not.

Q. Okay. Your understanding of the word "understand" is that the person have a factual as well as rational understanding; is that right?

A. Well, that's the definition for competency to stand trial.

Q. Okay. Then, what understanding were you searching for when you observed Mr. Panetti?

A. Whether he understood the basic word "understand."

Q. Okay. Would that basic word "understand" be a irrational or a rational understanding?

A. I would expect it to be a rational understanding.

Q. Okay. And that's what you looked for?

A. Yes.

Q. Okay. But you don't have a conclusion on it today because you didn't get enough information from him, I take it, during that examination?

A. No, because he wouldn't answer the question directly.

Q. Wouldn't or couldn't?

A. Wouldn't. And, actually, he had a point. His view of he [34] has a purpose there is something that he can believe. I don't see that –

Q. You don't doubt the delusion that he believes he's on death row for – his purpose to be on death row is to preach the word of God?

A. I think that's an assumption to say it's a delusion. I think that there are a lot of people who may believe they have a purpose in whatever they're doing. That doesn't mean they don't understand why they were put there.

Q. Well, which is more likely? You reviewed his psychiatric records, didn't you?

A. I did.

Q. You know he was burying furniture before the offense even happened?

A. I saw that.

Q. That he has written bizarre letters to people, preaches day and night, bad hygiene, he wouldn't shave, he claimed he was a Nazarite. Does that ring a bell?

A. Years ago.

Q. Okay. This didn't happen like overnight. This wasn't a prison conversion. He's been having this religious delusion since 19 – since the '80s.

MS. DETTMER: Your Honor, I'm going to object at this point. There was not a question. That was him testifying as to the record.

[35] MR. HAMPTON: Well, I'm seeing that she's agreeing. She's nodding her head.

THE COURT: Let's do have a question.

Q. (BY MR. HAMPTON) All right. You remember all of that?

A. I remember in the records a lot of the things that you've just stated. When I saw him his hygiene was good.

And I'm not saying that he's not strange and there's nothing wrong with him.

Q. Would you disagree with the repeated diagnoses of him as a paranoid schizophrenic?

A. I don't have a diagnosis of him because he wouldn't cooperate. The records indicate many things and including rule-out of malingering, and including a number of folks who thought he appeared to be malingering. So I don't have a conclusion about his diagnosis, and I don't need to have one.

Q. Well, what you told the Court is, hey, he could just – this may not even be a delusion of him being on death row for preaching the word of God. It could very well be that this is just an ordinary belief system of somebody. Isn't that what you were saying?

A. I didn't say "ordinary." And you know what, I'm not answering these "Yes" or "No." So I guess I'll have to take back that I'll answer questions "Yes" or "No." I didn't say it was ordinary. I said that somebody can believe that they have a purpose and still be able to understand a factual basis [36] that is different from that purpose.

Q. What scholarly publications would you cite for competency-to-be-executed evaluations?

A. I would not give you titles or names of anything. I'm very bad at names.

Q. All right. Any journal articles you reviewed regarding competency-to-be-executed evaluations?

A. Just ten years of experience, hundreds of people, evaluating folks for mental illness, and knowing what the definition was by the court standard.

Q. You made your notes available to us, correct?

A. Yes.

Q. Your notes – do you have them there?

A. Yes.

Q. Okay. If I ask you something and it doesn't ring a bell, then feel free to go through your notes.

But in your notes, I see that you wrote that Dr. Parker asked Mr. Panetti, you could answer our questions if you chose to. And you wrote down that Mr. Panetti responded, I must obey the living Lord. Dr. Parker, you noted, asked, is the living Lord telling you not to answer our questions, and Mr. Panetti said yes. Is that correct?

A. That sounds right.

Q. Okay. And you also noted Mr. Panetti said the devil is trying to rub me out for preaching the word of Jesus Christ.

[37] A. That sounds correct, also.

Q. Okay. Now, about cooperation, you asked him to do a psychological questionnaire, right?

A. That's right.

Q. He said, I can, but I'll have to ask Marine Corps Gross first.

A. Uh-huh.

Q. Referring to his attorney, Mike Gross?

A. That's right.

Q. And later, he said, or my parents could tell me, right?

A. I remember him talking about his parents. I don't remember if he said that they could tell him to do the questionnaire.

Q. Well, but no questionnaire was ever administered to him by you or Dr. Parker?

A. That's correct.

Q. Okay. And he wasn't being uncooperative when he agreed to take the test?

A. He didn't agree. He said that he would have to check with his attorney.

Q. Have you reviewed the prison medical records, as well?

A. I did.

Q. Okay. I want to show you from four pages, which, unfortunately, are not marked. I pulled them out of another – I mean, the page numbers for your deal, but I'll show them [38] to you.

MS. DETTMER: Just give us a date on them.

MR. HAMPTON: They're all going to look like this, basically.

Q. (BY MR. HAMPTON) I'm going to show you four examples from his TDCJ records, and see if that looks like

something you reviewed. Specifically, I think they are classification records.

A. I reviewed hundreds of pages, and these were probably in there. I don't specifically recall these. But I will take your word that they are from his records.

Q. I'm going to offer Plaintiff's Exhibit 3, 4, 5 and 6.

MS. DETTMER: No objection, your Honor.

THE COURT: Petitioner's 3, 4, 5 and 6 are admitted.

Q. (BY MR. HAMPTON) Dr. Anderson, can you tell the Court the IQ, the classification gave to Mr. Panetti?

A. If this is EAIQ, if that means his IQ, then they have minus 60, which I don't know if that's what that means or not.

Q. You're looking at No. 3.

A. I don't agree that his IQ is less than 60.

Q. That's right. There's no way his IQ is 60.

A. I don't believe that his IQ is less than 60.

Q. Right. Or 60?

A. Or 60.

Q. In the other documents, as you'll see, reflect 60, one [39] says minus 60, under 60.

MS. DETTMER: Your Honor, I'm sorry. Can I have a copy? I don't have a copy of that exhibit, and I don't have one here either.

MR. HAMPTON: Yeah. I can show you.

THE COURT: I want to make sure I understood your answer. Your answer was you don't believe that his IQ is 60 or under?

THE WITNESS: That's correct.

THE COURT: All right.

Q. (BY MR. HAMPTON) I want to talk some more about lack of cooperation versus an inability to. You decided after the interview with him that he was deliberately being uncooperative with you, right?

A. I decided that that was how it appeared, yes.

Q. And that the basis for that inference that you're making that he's uncooperative is because his responses to you are indirect and inappropriate to your question?

A. No.

Q. Then, what objectively can you state to the Court that would lead you to conclude that his mental state is a deliberate choice rather than a manifestation of his mental illness?

A. Because he presented with good hygiene. He was controlling. He paused at appropriate points. He made very [40] good eye contact. And he told us that we weren't answering questions the way he wanted us to. He said, you want it from the horse's mouth, but when the horse speaks, you do not hear. You're not hearing it the way you want to hear it, and that's exactly right. He was not responding in ways that we wanted to hear. He was responding, instead, in ways that were quotes from the bible and things that would not give us the information to

make a final conclusion that he knows exactly why he's being executed.

Q. Why isn't this consistent with someone who is suffering from schizophrenia?

A. I'm not saying whether or not he has schizophrenia. He may. But that is not the question I was being asked.

Q. Okay. So you are making a conclusion about the state of mind of somebody who you know from the psychiatric records has diagnoses going back to 1981. And here today, you're saying you're making that conclusion without personally knowing or concluding whether or not he's suffering from schizophrenia?

A. The label is not the question I was asked. There are many diagnoses he's given, including questions about the validity of his psychotic symptoms that are throughout the records. He is a difficult person to assess and he –

Q. Is that inconsistent with schizophrenics in general?

A. Okay.

THE COURT: Now, you have your turn and she has her [41] turn, and the court reporter can't get both of you. All right.

A. He may or may not be schizophrenic.

Q. (BY MR. HAMPTON) You don't know?

A. I do not know.

Q. You've never made a conclusion about that?

A. I do not have a conclusion about that.

Q. Yet, you've made a conclusion that his responses to you during that interview were deliberate choices that a rational person could make, true?

A. I have concluded that his responses to me at the time that I saw him were deliberate, in my opinion, avoidances of the questions I was asking, and it was based on the way he responded, how he responded, his choices of almost – his responses were responsive; they were just indirect. When he said we were trying to trick him like they tried to trick Jesus, well, you know what, we were there to evaluate him for competency to be executed. I think he understood that. And he is absolutely right that if our conclusion is that he's competent, and if he gives us that information directly, then he will be executed. And that's what he said, that we are there as, in his perception, destroyers. He is projecting as if it's our fault if he gets executed as opposed to his. But he has a point, and there are people who have that viewpoint.

Q. So you were there to try to trick him?

[42] A. No.

Q. But yet, he accused you of that?

A. That's correct. That's his viewpoint.

Q. And your viewpoint really comes down to a subjective determination on your part, doesn't it?

A. It's both subjective and objective.

Q. The objective being what?

A. The mental status, his presentation, his capacity to have very complex abstract responses to questions, and the review of records, the interview of people who work with him, and the information available in his death packet, a lot of sources.

Q. Your basic conclusion, really, for the Court is the only one that you feel that you could give as a professional opinion is that he has a capacity to understand rationally?

A. In my opinion, he appears to have the capacity to understand. That's right.

Q. Okay. Did you know whether or not he was on medication that day?

A. He was not on psychiatric medications according to the records.

Q. Okay. When was the last time he was on that?

A. Long time.

Q. How many times has he been hospitalized?

A. He's been hospitalized a number of times. I don't know how many exactly.

[43] Q. All right.

A. Years ago.

Q. And what part of the report did you contribute to?

A. Dr. Parker and I worked on the report together. I don't have specific, I wrote this line, he wrote that line.

Q. Okay. Any disagreements?

A. What's in the report is agreed on by both of us.

Q. Is it ordinary to do joint reports?

A. For us, yes.

Q. You left after an hour?

A. Of interviewing Mr. Panetti –

Q. Uh-huh.

A. – we left that part of the evaluation after an hour.

Q. He seemed, I take it, throughout the interview pretty suspicious of you?

A. Well, he didn't appear fearful kind of suspicious. He seemed to know why we were there. And, yeah, he didn't want – I don't think the guy wants to die. And the evaluation was to determine whether or not he understands about being put to death. So I don't know if I'd call it suspicious, as opposed to he considered us there as folks who were going to contribute to his death.

Q. But you weren't?

A. I was not there for that purpose. I was there to give an opinion about his competency to be executed.

[44] Q. He mis-perceived that.

A. Well, he has his own perception and he has a point. He has a right to his viewpoint. It's not the way I go about it. I consider that I will give a straightforward viewpoint, and it is whatever it is. I don't – I don't have an agenda of what the answer is. I want to go and try and figure it out. So my viewpoint is very different. But his viewpoint, apparently, was that we were there in order to

assist in him dying. And, you know, I can understand where somebody might have that viewpoint. It's just not my viewpoint.

Q. Well, you know that he was diagnosed as a paranoid schizophrenic, right?

A. We got that one down, yes, sir.

Q. Okay. How many people have you evaluated for schizophrenia?

A. Very, very many.

Q. Okay. And they tend to be very suspicious people?

A. If they're not treated, they could be very suspicious. That's right.

Q. They have delusional systems?

A. They can.

Q. If his delusional system is what he represented to you and Dr. Parker, do you agree that he would be incompetent to be executed?

A. Not necessarily.

[45] Q. I'm specifically referring to he's being executed for preaching the word of God?

A. Well, again, I don't have a conclusion because he wouldn't tell me that he understands the facts of why the law says he's being executed.

Q. All right. You're not – then you're not saying – you're not telling the Court that he's competent to be executed or not competent to be executed based upon his understanding of why he is to be executed?

A. I am not giving a conclusion whether he's competent to be executed.

Q. All right. Pass the witness.

RE-DIRECT EXAMINATION

BY MS. DETTMER:

Q. Dr. Anderson, you're not giving a conclusion on whether he's competent to be executed because he wouldn't cooperate with this interview, right?

A. That's right.

Q. What are you giving a conclusion on?

A. That in my opinion, he appears able to understand the facts of why he is being executed. But since he would not say it to me, then I will not make that conclusion.

Q. So because he did not say the words to you, I know I am being executed because X, you're not willing to make that ultimate conclusion, correct?

[46] A. Because he did not say, I'm being executed for being convicted of capital murder, then that's right. I won't give a final conclusion because that's not up to me to determine.

Q. Okay. But based on everything else you reviewed, he has the ability to understand that, correct?

A. That's my opinion.

Q. Just one last question.

You testified earlier that when you asked him to take that test, he indicated he would have to check with his counsel before and get permission from counsel before he would agree; is that correct?

A. Yes.

Q. So he was aware of the fact that you were not there on behalf of counsel?

A. Sounds like it.

Q. I'll pass the witness, your Honor.

RE-CROSS EXAMINATION

BY MR. HAMPTON:

Q. You say you can't determine whether or not he knows why or – why he is to be executed because he didn't really cooperate with you, right?

A. That's right.

Q. All right. Yet, when asked that specific question, he answered your question. He said, for preaching the word of God, right?

[47] A. He did at some point say that, that's right.

Q. And that's an objective basis from which to conclude that he is incompetent, right?

A. I disagree.

Q. All right. Let me reverse it, then. What if you had asked him, why are you here on death row, and he said, for the murder of my parents-in-law, would you then have concluded that he was competent to be executed?

A. That and in combination with the other material, yes.

Q. And so, depending on what his response is, if he gives you the green light, the correct answer as to why he's on death row, and it's the correct one under the law that will put him to death, that one you will believe; but if he gives you the absolute opposite, which is the statement of his delusion that he is on death row for preaching the word of God, that one gets discounted and you won't agree with that, right?

A. Wrong.

Q. Well, that's what you just said.

A. No, it's not.

THE COURT: Well, we're being argumentative. I didn't hear her say that, so let's just relax just a little bit.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) When you give a report to a court, do you agree that it is important to give objective bases for your opinions?

[48] A. Yes.

Q. Do you think its important to demonstrate to a court the process by which you arrive at your conclusions?

A. Maybe.

Q. Well, do you think that it – your role is for a court to simply rely upon your own subjective determinations about somebody when you evaluate them?

A. Not generally.

Q. Okay. So they're looking for hard data?

A. I imagine in part, that's right. They're also looking for my expert opinion based on a lot of information that I've gained over the years.

Q. Okay. So experience and your expertise is what you're offering to the Court, right?

A. One of the things.

Q. Is that more important than detailing for the Court the objective bases for your conclusions?

A. I don't have an opinion on that.

Q. All right. Pass the witness.

MS. DETTMER: Nothing further, your Honor.

THE COURT: I want to know in your communication with others about Mr. Panetti who you talked to and how that played a part in the testimony you've given today.

THE WITNESS: I was reviewing records. And the woman who brought us the medical records said that the day before [49] she had gone to get a release signed by Mr. Panetti and for the review of the records, and he said, no, that he was not going to sign that, that his attorney had not told him to. And I'm paraphrasing here. That was one person. But we actually had a court order, so that was why we were able to review the records, anyway.

I talked with staff members, even as we were walking back to death row, who worked with Mr. Panetti and say, yeah, he can hold a conversation. The longest conversation was with Captain – I think it's Miller, if I remember

correctly. Major Miller, I'm sorry, who is apparently in charge of death row and has had conversations with Mr. Panetti, and was the one who filled out the – what they call the death packet with Mr. Panetti. And he said that Mr. Panetti filled it in. I have a copy of a handwritten death packet where he picks his –

THE COURT: I've heard Mr. Miller's testimony.

THE WITNESS: Okay.

THE COURT: But did you talk with people in addition to Mr. – Major Miller, I believe is his term – that had daily contact with Mr. Panetti?

THE WITNESS: Just with a couple of the guards and the folks that are already mentioned, and the sense was that he does preach a lot. Everybody knows – I mean, everybody who heard the name did know that he preaches a lot. But that, [50] also, he's able to hold a conversation.

THE COURT: And in your putting together this information and lack of information that you had, how much did you, if you can tell me, use the information you got from observers there in the unit?

THE WITNESS: It was used – I had an impression, but I wanted to make sure that the other information available was consistent. And so, it was used in that it was consistent with my impression based on what I had seen myself of Mr. Panetti. So if it had not fit – it's kind of like putting a puzzle together. If it had not fit, then I would have continued to gather more information and try and understand what was going on.

THE COURT: Did it have – did the information you had from the guards, and Major Miller, and those people who are in attendance on a regular basis, did that have any influence on you as to your belief that Mr. Panetti was deliberately avoiding your questions?

THE WITNESS: Yes.

THE COURT: All right. Mr. Hampton, any further question?

MR. HAMPTON: No, Judge.

THE COURT: Any further question, Ms. Dettmer?

MS. DETTMER: No, your Honor.

THE COURT: May this witness then be excused?

[51] MS. DETTMER: Yes.

THE COURT: You may be excused.

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[51] MARK D. CUNNINGHAM, called by the Petitioner, duly sworn.

[52] DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Dr. Cunningham, are you a psychologist?

A. Yes, sir. I'm a clinical and forensic psychologist in private practice.

Q. All right. And are you board-certified?

A. Yes, I am.

Q. Who certified you?

A. I'm board-certified in forensic psychology by the American Board of Professional Psychology.

* * *

[59] Q. (BY MR. HAMPTON) You've heard the testimony of Drs. Parker and Anderson?

A. Yes, I have.

Q. And they have used phrases – Dr. Anderson just said that he was able to, he had the capacity to respond. Dr. Parker says that he's controlling, deliberately not responding. Do you think these are fair characterizations of – and you've interviewed Mr. Panetti?

A. Yes, I have.

Q. Along with these records. Do you think this is a fair characterization, and if not, why not?

A. No, sir, I don't think it's a fair characterization.

Q. All right. Tell the Judge, in short order, what's wrong with this report.

A. There are a number of reasons why I think that Mr. Panetti cannot be regarded as simply uncooperative. Very importantly, the behavior pattern that he displayed in his interview with the state experts of speaking around the issue, not coming to [60] the point, responding with religiosity, instead of with a concrete answer, is entirely consistent with what was described by people who have

interacted with him historically who would, otherwise, be regarded as on his side.

So, for example – and I could turn to places in the affidavits and the records, if it's helpful to illustrate it – but Scott Monroe, his stand-by counsel, described in his interactions with Mr. Panetti that he did a similar sort of thing with him.

Q. And for the record, that is his own attorney?

A. That's correct.

Q. He was trying to save his life?

A. Yes, sir.

Q. And he's not cooperated with him?

A. He's describing –

THE COURT: It's the attorney he rejected. He was a stand-by counsel at the end, and I have no doubt that he was trying to do his best in between taking all of the Aspirin that he probably needed.

MR. HAMPTON: I'm just drawing the contrast.

THE COURT: I understand.

MS. DETTMER: I just want to make sure that I'm objecting to the form of the question and would ask that he would not lead this witness. It's his witness.

THE COURT: Okay. Make it timely if you're going to [61] object.

A. Not only with his stand-by counsel but, also, with Richard Mosty, who testified at the competency hearing and described, for example, Mr. Panetti had a list, that I

would estimate of handwritten stuff, of 15 to 20 pages of things that he was not going to talk to us until he had – for lack of a better word, until he had interviewed us. Question: And did you find those questions related in any rational way to the crime, or to his attorneys, or to anyone anything? They did. They had absolutely no relation to the case. They were – there were personal questions. There were questions like whether or not the lawyers had ever used hallucinogenic drugs, whether or not we had had sex with a man, you know, a whole list of questions like that that he was going to ask us before he would talk to us.

Q. And that is the – you're reading from the record from one of –

THE COURT: Competency hearing.

MR. HAMPTON: Yes.

A. The competency hearing September 9th, 1994, Volume 13 of 43 volumes.

This same sort of interaction pattern is displayed as Mr. Panetti interacts with his family members. And so, for example, when you review the affidavit of Jessica McBride and Victoria Panetti, they described that he was doing the same [62] thing with them; that they would go with an agenda of things they needed to try to talk to him about, and instead, he would take over the conversation and dominate it and not let them get a word in edgewise, and be off on all kinds of tangents that were irrational, and delusional, and over-religious, and that sort of thing.

Now, as an expert, as I encounter the way that somebody is reacting to me, one possibility is that it's situation-specific. He's reacting this way to me because of what I'm here to evaluate, and it's a deliberate thing. To the extent

that this same sort of interaction pattern, though, is demonstrated multiple times in the past with many different individuals, including individuals that would otherwise be seen as in his corner, then it's much more difficult for me to support a hypothesis that this is because of my role, or what I'm doing, or that somehow he's behaving in a fundamentally different way with me than he has with other individuals.

Now, one of the things that Mr. Mosty observed is a differential is that when Scott is interacting in a place that he is very comfortable and familiar with, that if he stays in the same place, in the same jail, interacting with the same people, then in those conversations, particularly about more mundane matters, he tends to be more lucid. As you confront him with a new situation, it's as if it overwhelms his RAM, his capacity, and then, he doesn't – then, he goes off on [63] these tangents and is much less – is much less relevant.

Q. All right. And a person in that situation that's coming on to him under the latter scenario that you just said, he's going to appear, I guess, uncooperative with someone?

A. Yes, sir. He is more likely to be overtly psychotic in his interactions as you increase the stress that he's under.

Q. Okay.

A. So as he's interacting with somebody who is unfamiliar to him, as you're talking about case-specific information that is anxiety-provoking, or disturbing in some way, then he exhibits this more disorganized thought pattern and takes over the conversation. And this isn't just

with Drs. Anderson and Parker. This is with his family and with his attorneys, and is entirely consistent with somebody who's schizophrenic.

Q. Okay. Then, what's wrong with Dr. Anderson's testimony that, in her opinion, he has the ability to answer the questions but was deliberately choosing not to?

A. Well, first, you have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. It doesn't make them retarded where they don't know where the door is, don't know that you're a doctor, don't understand that these are corrections officers. It doesn't render them stupid.

Instead, you have a situation where – and why we call schizophrenia thought disorder is the logical integration and [64] reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.

And so, when I encounter someone like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic, and that's what they can do under these demand characteristics. Now, it may be that if they're dealing with someone who's more familiar, if they're inside their own cell, where they spend 23 hours a day and have for years, and what may feel like a safer, more enclosed environment for them – and we're talking through this little screen in the door about their commissary, or about whether they're going to come out for a visit, that those sorts of interactions may be reasonably

lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

Q. Well, did you hear the testimony of the correctional personnel?

A. Yes, sir, I did.

Q. Would you – is there other personnel at the prison that you would have preferred to have heard from?

A. Oh, yes, sir.

[65] Q. Okay. Who would that be?

A. I would prefer to have heard from the rank-and-file officers who are passing his tray through the door to him every day, who are cuffing him up to bring him out to exercise, who are watching him circle the exercise area, you know, shouting and preaching and singing, and those kinds of things, the folks that had day-to-day, practical, repeated, extensive interactions with him.

Q. All right. Now, Drs. Parker and Anderson spent an hour with him and left. Others have had much better luck with him.

How do you explain that Dr. Conroy and Dr. Rosin and Dr. Silverman were able to gather a lot more information than Parker or Anderson?

A. Well –

MS. DETTMER: Your Honor, I'm sorry, before he answers the question, I'm going to object. I'm pretty sure that's speculation on his part as to – I mean, he wasn't

there for those interviews. I don't think that he – without speculating, he can't explain that.

MR. HAMPTON: Well, I think he can – he's heard all the testimony here today.

THE COURT: So have I.

MR. HAMPTON: And he can point out, at least, one of the reasons of the apparent issue of cooperation versus non-cooperation.

[66] THE COURT: Well, he wasn't there. I sustain the objection.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) A person who suffers from schizophrenia – well, is it wrong to assume that a person who's suffering from schizophrenia is either completely a raving lunatic all the time or is completely faking it and is rational? I mean, is it a "neither or" situation?

MS. DETTMER: I'm not sure how this is in rebuttal to either Dr. Anderson or Dr. –

THE COURT: It is not. I sustain the objection.

Q. (BY MR. HAMPTON) Well, you heard Dr. Anderson's testimony?

A. Yes, sir.

Q. Did she make certain assumptions when she made – that you could perceive as an expert when she arrived at her conclusions?

A. Yes, sir.

Q. What are those?

A. One of those was the interpretation that she gave to very, very symbolic material about Jesus, and what Jesus said, or a parable about Jesus, and those kinds of things, and then, inferring that, therefore, that means Scott understands this. Now, what Scott is putting out is this very religious symbolic sort of information. I take that – or Dr. Anderson's in a rational mind and I say, okay, rationally, what sense does [67] that make? But I really don't know whether that's the connection that this person is saying or not. That's the imposition of my rationality on what they're putting out in a pretty symbolic sort of way.

Now, Dr. Anderson asserts that Mr. Panetti is uncooperative, and I don't agree with that characterization. Mr. Panetti is in the room and he is verbalizing and responding. As a mental health professional, my role is to try to understand the mental processes of this individual. If they're talking, I ask a question. What I get back informs my perceptions of them.

Now, I don't need for them to respond in a highly rational, linear, logical sort of way in order to gain information about their thought processes, otherwise, I could never really get a notion of the thought processes if somebody was floridly schizophrenic, because when you talk to them, that's not how they respond. And so, if he's talking, I'm gathering information. And the longer that I sit there, the more information I'm going to get.

Now, with Dr. Conroy, he got up and left the room after an hour and a half. Much less cooperative than this where he's still present when the interview is concluded. And so, as he continues to talk, there's an opportunity to get information about just how long can he keep it up, if there were questions about whether he's manufacturing

this. There's [68] also the possibility that as I wait him out and he becomes more familiar with me, that his anxiety level decreases, and the capacity to be more relevant may emerge; or that I may get some tidbits here and there while I wait through the other things that he has to say.

Q. Okay.

A. And so, he's giving information and –

MS. DETTMER: Your Honor, I know I should have objected to this more timely, but I would ask for a question and he be responsive.

THE COURT: Well, I haven't seen in Petitioner's 8 that you didn't object to his report once, I'm sure covering a lot of this stuff. His evidence in the report, I'm sure is more than rebuttal. But this, at least, is in the nature of rebutting the testimony of others, so I will hear it.

MS. DETTMER: Okay.

Q. (BY MR. HAMPTON) Do you think as an expert who's evaluated people with schizophrenia, do you think it is fair to conclude that his behavior with Parker and Anderson was the result of a conscious choice on his part to not cooperate?

THE COURT: Well –

MR. HAMPTON: All right. Let me ask this, then.

Q. (BY MR. HAMPTON) There is one thing that Dr. Parker, whose testimony you heard, did conclude and that is – and we've heard it throughout that they intend to kill him and that he [69] understands that. That you heard that testimony?

A. Yes, sir.

Q. Okay. Is it clear to you, having read the records and interviewed him yourself, of what his understanding who "they" is? Does he understand – essentially this: Does he understand that it is the state of Texas that intends to take his life?

A. Not as a lawfully constituted authority.

Q. What's your basis for that opinion?

A. He described in my own interview of him that he was going to be executed – and I'll turn to that so I can quote it, specifically. I asked him why he is on death row, why is he going to be executed. He said, for preaching the gospel of Jesus Christ. And he went on to say that they didn't want him to go back to Wisconsin preaching the gospel, and that the anti-Christians were there. And I said, who were they? And he said, well, it's the national headquarters for the Wickens. And then, he went on to describe that this conspiracy goes up into the highest levels of the administration.

He also talked about regarding the date of his execution that they might try to sneak him in, that they might try to execute him early, even in advance they, the state. So as he's describing the state of Texas, he's not characterizing – doesn't reflect a perception of the state of Texas being lawfully constituted authority, working under the constraints [70] of the law.

Q. Okay.

A. Rather, he's describing this as being in league with the forces of evil to prevent him from preaching the gospel as a specific delusional belief.

Q. All right. Which is consistent with the rest of his delusional belief?

A. Which is consistent with his long-standing delusions of religiosity, as reflected in his psychiatric hospitalizations and schizophrenia diagnoses and schizo-affective diagnoses through multiple psychiatric hospitalizations during the 1980s.

Q. Would you agree that expert opinion per court-of-law that the highest value for expert opinion in a court-of-law is reliability?

A. Yes, sir. The greatest benefit is of highly illuminative and descriptive information so that the Court or the jury is able to come to their own well-illuminated conclusions. It's not the reliability of my ultimate determination, it's the data that I gather and the detail of that data, and the logic of how I integrate that data.

Q. The process?

A. The process. The details, the data, and the process, not the ultimate conclusion.

Q. All right. Last question I want to ask you about is [71] you've reviewed the psychiatric records from the prison, right?

A. Yes, I have.

Q. There is a Dr. Gilhousen, I think is the one that's mentioned there?

A. Yes, sir.

Q. Are you familiar with him?

A. I have encountered his name in prison records before, yes, sir.

MS. DETTMER: Your Honor, I'm not sure how this is in rebuttal of Dr. Anderson or Dr. Parker's testimony.

MR. HAMPTON: Well, it was brought out that these records got introduced into evidence, and there's some indication from these doctors that they've – that he's malingered. There's no basis for it, of course.

THE COURT: Now, let's – you know, I'm trying to be as patient as I can. If you want to testify, you take the oath and you get up here. I've been patiently listening, and I don't disagree with a lot of things that Dr. Cunningham is saying, but it was all existing before a jury found this man competent, and another jury found him sufficiently competent to convict him and give him the death penalty. And a judge found him competent to represent himself, which was not reversed on appeal.

So let's finish it up. If you're going to throw muddy [72] water on this doctor who didn't testify, let's throw the muddy water and get it on.

Q. (BY MR. HAMPTON) Okay. Do you know anything about him?

A. I have encountered his name in other medical records of individuals on death row.

Q. Have you detected any sort of a bias on his part?

MS. DETTMER: Your Honor, that is speculation.

THE COURT: Do you know him?

THE WITNESS: I don't know him apart from his records.

THE COURT: Yeah. I sustain the objection.

MR. HAMPTON: That's all I have.

THE COURT: All right. Counsel, we'll reconvene. I've got some matters at 1:30. We'll reconvene, I hope, by a quarter of 2:00. If not, be a little patient. We'll be through as soon as I can with the 1:30 hearings.

(Lunch recess.)

THE COURT: All right. The Court recalls 04-CA-42, *Scott Louis Panetti vs. Dretke*.

Dr. Cunningham's still on the stand. You understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: Ms. Dettmer, the witness is yours.

MS. DETTMER: Your Honor, we have no questions for this witness.

THE COURT: Okay. All right, sir. You may step down.

* * *

**PETITIONER'S EXHIBIT 2**

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June 11, 1997

John Rowland, Esq.
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In re: Scott L. Panetti (999164)

Dear Mr. Rowland:

Pursuant to your request, I evaluated your client, Scott Lewis Panetti, with regards to his Writ of Habeas Corpus before the Court of Criminal Appeals. Mr. Panetti represented himself before the jury in his capital murder trial in 1995, and received the death penalty. I interviewed Mr. Panetti on February 6, 1997 for two and a half hours. Prior to his interview, I informed him of the purpose and non-confidential nature of the evaluation; he said he understood and gave his consent. In addition to his clinical interview, I also relied upon the following records in reaching my opinions:

1. Medical Records, Kerrville State Hospital.
2. Medical Records, Starlite Village.
3. Medical Records, Waco Veterans Administration Hospital.
4. Medical Records, Tomah Veterans Administration Hospital.
5. Medical Records, Northern Pines Unified Services.

6. Medical Records, Cumberland Memorial Hospital.

7. Medical Records, Kerrville Outpatient Clinic.

8. Medical Records, Texas Department of Corrections.

9. Medical Records, Bell County Jail.

10. Records, Fredericksburg Police Department.

11. Statement, Sonja Panetti.

12. Trial Record, State v. Scott Lewis Panetti.

Based upon the foregoing information to date, I have the following opinions, all to a reasonable degree of medical certainty.

1. Scott Lewis Panetti suffers from Schizoaffective Disorder (a combination of Schizophrenia and Manic Depression).

2. Scott Lewis Panetti suffered from Alcohol Abuse which exacerbated his above condition.

3. Scott Lewis Panetti suffered from Cannabis Abuse which exacerbated his above condition.

4. Scott Lewis Panetti's psychiatric illness contributed to his mental state at the time of this offense.

5. Scott Lewis Panetti's psychiatric illness, particularly the Schizophrenic component, gave rise to his waiver of counsel and choice to represent himself.

6. Scott Lewis Panetti's psychiatric illness rendered him incompetent to undergo his capital murder trial (guilt/innocence and sentencing components).

## RELEVANT HISTORY

**Incident:** Mr. Panetti was under an order of protective custody having threatened to kill the parents of his wife. On September 8, 1992, Mr. Panetti drank alcohol, sawed off the barrel of his shotgun, and shaved his head before dressing in Army fatigues and taking a shotgun, rifle, and several knives with him to the residence of his parents-in-law where his wife and daughter was staying. Mr. Panetti entered their home and shot both of his wife's parents before taking his wife and daughter to his bunkhouse. Mr. Panetti changed into a suit prior to turning himself in when the police surrounded his bunkhouse.

Mr. Panetti underwent a first competency hearing in Boerne, where the jury could not decide his status to stand trial. He underwent a second competency hearing in Georgetown where the jury found him competent to stand trial. Mr. Panetti allegedly had an April Fool's religious experience on April 1, 1995, discontinued his medication, and subsequently requested that he represent himself in his capital murder trial. The jury convicted him of capital murder and sentenced him to death in September, 1995.

**Psychiatric:** Mr. Panetti was first hospitalized in 1981 at the Kerrville State Hospital. Records revealed he was hostile, defensive, suspicious, grandiose, and claimed that he was mistreated by others. His diagnosis was Alcohol Dependence. Mr. Panetti was admitted to Starlite Village (for alcohol) in April, 1986. However, records indicated he

was hyperactive, distractible, hostile, grandiose, paranoid, and had impaired attention and incoordination; he was also psychotic, delusional, and actively hallucinating. His diagnosis was Chronic Undifferentiated Schizophrenia, Alcohol Intoxication Abuse, Alcohol Abuse and Dependence, and Marijuana Abuse. He was transferred to Kerrville State Hospital for further evaluation. Hospital records there indicated that Mr. Panetti had a history of periodically speaking incoherently and was paranoid and grandiose. He was diagnosed with Alcohol and Cannabis Abuse and Dependent Personality Disorder prior to his transfer to the Waco Veterans Administration Hospital for further evaluation. Waco Hospital records indicated that Mr. Panetti was paranoid and buried some of their (his family) furniture because of his belief that the devil was in the furniture. Mr. Panetti had nailed their curtains shut so neighbors wouldn't film them. His doctors gave him a diagnosis of Chronic Undifferentiated Schizophrenia, Alcohol Dependence, and Marijuana Abuse; and treated him with anti-psychotic medications. After his discharge from the Waco VA Hospital, Mr. Panetti moved to Wisconsin and was noncompliant with his medications and follow-up. He was subsequently hospitalized at Northern Pines Unified Service because of his depression and suicidal ideation. Subsequent records indicated that he was grandiose and believe the Feds watched him; he was admitted to Cumberland Memorial Hospital with a diagnostic impression of Major Depression, Chronic Alcohol Dependence, Polysubstance Abuse, Minimal Brain Dysfunction, and Antisocial Personality Disorder. Hospital records indicated there were also delusions of reference, auditory hallucinations, and homicidal ideation (hurting his family). Mr. Panetti later returned to Texas and was subsequently hospitalized at Starlite Village for a second

time. Because Mr. Panetti was psychotic, he was transferred once again to the Kerrville VA Hospital. There, his psychiatrist diagnosed him with Schizoaffective Disorder and treated him with a combination of Trilafon (anti-psychotic), Elavil (antidepressant), and Lithium (mood stabilizer). He was followed in the outpatient clinic, and his condition was relatively controlled on this medication regimen. In August, 1990, Mr. Panetti was involuntarily committed to the hospital because of homicidal behavior; threatening to kill his wife, baby, father-in-law, and himself, breaking their door window twice, and swinging his sword around the house. Records further revealed that Mr. Panetti believed there was a plot against him by the citizens of Fredericksburg. In July, 1992, Mr. Panetti was once again admitted to the Kerrville VA Hospital showing evidence of manic symptoms. Records indicated diagnoses of Schizoaffective Disorder and Alcohol Dependence. During this hospitalization, records first revealed the possible presence of three personalities or aspects of himself that he gave names to. Records also indicated that Mr. Panetti had once again threatened his family with a sword and that delusions, grandiosity, and psychotic religiosity, i.e., that Mr. Panetti was Nazarite were present. Subsequent Bell County Jail records showed that Mr. Panetti was evaluated in late September, 1992, and prescribed Trilafon (anti-psychotic) for his symptoms. Medical records later revealed that Mr. Panetti was on a regimen of Elavil, Haldol (anti-psychotic), and Prozac as late as March, 1995. Subsequent records however, indicated that Mr. Panetti was showing evidence of looseness of associations (thought disorder), clang speech (manic symptom), and disorganization of his thought processes. Further, records indicated Mr. Panetti was hallucinating and becoming more delusional.

**Pre-Trial:** Mr. Panetti made several pre-trial motions including motions to disqualify Judge Abels, for a continuance, to suppress evidence, to dismiss assistant counsel, and for a change of venue. In his writings, Mr. Panetti's central idea was that he would not get a fair trial in Fredericksburg or Gilespie County or Kerr County. He believed that people in Fredericksburg were plotting against him. Mr. Panetti also subpoenaed people that he was in the Navy with, jailers, first wife's family members, other inmates, and many people from Wisconsin who worked with him before; he also subpoenaed Anne Bancroft. The district attorney (Mr. Curry) even filed a motion to quash defense subpoenas (over two hundred witnesses) because they were vague, broad, and often illegible. Mr. Panetti continued filing motions for a new cell, for treatment of his mental illness, and for taking breaks outside due to cabin fever. One ten-page letter to Judge Abels just prior to the trial contained numerous Biblical passages, idiosyncratic expressions, flight of ideas (sudden changes in his though processes), loose associations (communication that was not coherently connected together), and incoherent, illogical thought processes (373-384).

In general voir dire, court records indicated Mr. Panetti was circumstantial (extraneous detail to the point of losing the main theme), tangential (not related to the central theme or task at hand), and with very loose associations at times. Records also cite numerous Biblical passages that Mr. Panetti used as a reference. He additionally indicated that he didn't need a lawyer because of his mental illness and paranoia and that lawyers were in cahoots (with one another).

**Trial:** Mr. Panetti's opening statement showed looseness of associations (32) and flight of ideas (32) that often made

his communication to the jury incoherent. For example, Mr. Panetti discussed having an appointment with an expert in Bell County before suddenly transitioning to the subject of being able to pay, and then on to the subject of Medicaid, and then on to the subject of some jurors that were not chosen, and later concluding that one of the jurors called him a liar. He often spoke of religiosity and even stated that he had confused thoughts. Although the court warned him that he had only two minutes left in his opening statement, Mr. Panetti could not proceed further in an organized and coherent manner.

Mr. Panetti's direct examination testimony essentially began with his birth. He discussed a near drowning episode, falling off a horse, and messing in his pants when he was a child. He later described his school in Wisconsin, the carpeting there, and how he wanted to look up his teacher's skirt. At one point, he showed the jury a tattoo on his arm (wounded sunbird) and went into excessive detail about it. After the court redirected him, Mr. Panetti talked at length about his high school sweetheart in a loosely connected manner. The judge redirected him for a second time to relevant evidence. After Mr. Panetti discussed bull riding, all conference high school interactions, and that his father looked like Colonel Sanders (they got a big food deal), the court redirected him time and again to the relevance of the guilt/innocence phase of his trial. After a lengthy discussion of the Naval Intelligence School and further repeated an unsuccessful redirects from the bench, the court eventually recessed for lunch. Following the break, Mr. Panetti's dialogue was circumstantial, tangential, and full of looseness of associations (1483). Despite continued redirection, Mr. Panetti described working with his father on a Texas ranch. At times, Mr.

Panetti in the middle of his testimony said – relevance – as if he and the judge had made eye contact. Mr. Panetti nevertheless continued going into excruciating detail about his first wife, their wedding, his previous job as a telephone and electrical line repairman, and his work on various ranches. The district attorney even asked the court to instruct Mr. Panetti to talk about his guilt or innocence and not about his life story. After taking off his ring and looking at it a couple of times, Mr. Panetti perseverated about his objection (repeatedly went over it again and again). Later in his direct testimony, Mr. Panetti discussed his alcohol problems, hospitalization at Starlite Village, having conversations with animals, seeing the devil, and performing an exorcism of his house – sticking knives in the ground to get the devil out. Despite numerous court redirects, Mr. Panetti continued discussing his medical history at length. Mr. Panetti eventually testified about Sarge (a separate part of himself that was later identified as an auditory hallucination) and stated that demons were cackling at him (at the time of his offense). He finally ended his testimony with the statement "just thy will be done."

During his closing statement in the guilt/innocence phase of his trial, Mr. Panetti exhibited looseness of associations and flight of ideas. The transcript revealed at one time that he seemed to play on the word *will* in his testimony (clang speech). Mr. Panetti then discussed his confessions, voluntary intoxication, and made an attempt at describing how he was mentally ill. He was, however, circumstantial and with little direction and coherence. In the punishment phase of his trial, Mr. Panetti once again exhibited looseness of associations, tangentiality, and flight of ideas in his thinking and communication. He was once again

religiously preoccupied, but discussed his mental illness and different personalities, and that he was responsible for the deaths of his in-laws.

**Interview:** Mr. Panetti began the interview by warning me that everything we said would be monitored because he was being punished for being a Nazarite. Mr. Panetti then rambled from one subject to the next without any ties or cohesion between his subjects. He talked of demons, Bible passages, alcohol abuse, being abused by the baby-sitter, homosexuality, various ranch jobs, and that he was a special messenger or prophet. Mr. Panetti described how he had a religious experience on April 1, 1995, and as a result gave up taking his medications. He said the spirits kept him strong because he had stayed with the Almighty before.

Mr. Panetti said his first lawyer didn't show up for a long time and that they had very little communication. Mr. Panetti said his lawyer wanted to save his life, but Mr. Panetti only wanted treatment for his insanity. Mr. Panetti said his female attorney did not want to present anything about his past psychiatric history, and that they were trying to sweep him away to a life sentence. Mr. Panetti said that he relied on is spirituality during his trial, and said the voices he heard were his allies, keeping him in check. Although the judge apparently wanted Mr. Panetti to quickly pick a jury, Mr. Panetti prided himself in being even with the DA on preemptory strikes of potential jurors.

Mr. Panetti said that his parents-in-law made Sarge come out. Although Sarge wanted to kill Scott, he reportedly could not. When Mr. Panetti went to his in-laws home, he said he shot them in the heart, and because of divine

intervention, they didn't suffer. As he left their house, he said demons were laughing at him, and he reportedly went to the bunkhouse because his saddle was there. Mr. Panetti said that his wife paid the Texas Rangers to apprehend him, and that the jury hated him. He waived his appeals (after his trial) to keep his dignity (because so many people were against him). Mr. Panetti further revealed his mission here was to withstand persecution because man could not execute a sacred Nazareth.

**Mental Status Examination:** Mr. Panetti was dressed in TDC attire. He had a long straggly beard and was disheveled. He had some eye contact with this examiner, and when present, was quite an intense stare. He was very suspicious and guarded. He was irritable and extremely religious, to the point it was difficult to understand his thought content. At times, when it was only he and I that were in the room, he stopped speaking as if he heard someone else talk to him. He spoke rapidly and with pressured speech, such that I had to interrupt him several times in order to carry on a conversation with him or keep him on track. Otherwise, he verbalized at length about nothing. He exhibited severe flight of ideas, jumping from subject to subject to subject with little cohesion. He showed tangentiality to my questions, giving a statement (answering) to my question that was totally irrelevant. At times when he began a statement (answer) that was appropriate) to my question, he went off onto a tangent that was similarly unrelated. Mr. Panetti was extremely circumstantial, giving so many extraneous details that it was difficult to assess the core theme or content of his statements. He was restless and hyperactive. He was very egocentric, to the point that he was delusional in a grandiose way (believing he was a messiah of some sort). He had

very little expression on his face except for an occasional smile that was inappropriately related to what he was speaking about. He often spoke with clang speech, rhyming his responses to whatever words I had used or to the last word he had used. He was also perseverative, in the sense that he would repeat a word or phrase or my own several times without reason. He had no insight into his condition. His mood was manic. His intellectual functioning was very difficult to assess, based upon his degree of incoherence and lack of logic. He was not suicidal or homicidal. He was oriented.

## SUMMARY AND CONCLUSIONS

Medical records indicate that Scott Panetti suffers from psychiatric illness throughout most of his adult life. Although records show varying diagnoses over the years, it is obvious that Mr. Panetti's mental state reaches psychotic proportions at times. Mr. Panetti's medical records also identify problems he had with alcohol and marijuana abuse, but these two substances cannot produce the chronic effects of a psychotic disorder. Any inference that Mr. Panetti's psychosis is as a result of abusing alcohol or marijuana is simply wrong, given the well known pharmacological profiles of these two substances. As a result, his abuse of these substances exist as a separate but parallel condition. The psychiatric literature is replete with studies showing the high incidence of alcohol and substance abuse in our nation's seriously mentally ill patients.

Records indicate that Mr. Panetti exhibits manic symptoms (grandiose thinking, rapid speech, flight of ideas, irritability). While alcohol intoxication can sometimes cause hypomanic-like symptomatolgy, Mr. Panetti's symptoms are active

despite not being intoxicated. It is therefore evident that whenever manic symptoms appear in his records, Mr. Panetti is indeed cycling through the manic component of his manic depression (bipolar Disorder). In my own interview of Mr. Panetti earlier this year, Mr. Panetti's mania is remarkable. He speaks rapidly. He has an intense interpersonal demeanor. He jumps from topic to topic. It is difficult to intervene/interrupt him while he's talking (pressured speech). He has grandiose delusions (believing he is a messiah of some sort). The intensity and severity of his symptoms during my interview of him (also corroborated in medical records by other clinicians) is too difficult to feign, as some clinicians have inferred previously. It is obvious that Mr. Panetti does indeed suffer from a manic depressive condition intermixed with a though or psychotic disorder (below).

As I state earlier, Mr. Panetti's records reveal the presence of a thought disturbance, both in perceptions (auditory hallucinations), content (delusions that his home is possessed by demons, that the Feds followed him, that people in Fredericksburg were plotting against him – including his attorney, that our own conversation during his interview was being monitored) and processes (loose associations, tangentiality, clang speech, perseveration – repeating the same topic over and over). Although Mr. Panetti is at times manic (his past medical records and during my interview of him), it is more evident that he has a thought disorder consistent with Schizophrenia. During my evaluation of him earlier this year, he continues to exhibit loose associations, tangentiality in his thinking, delusions of persecution, and bizarre and idiosyncratic thinking. These symptoms corroborate what others observed in him in the past. As a result, Mr. Panetti's psychiatric

condition is a combination of Schizophrenia and Manic Depression (Bipolar Disorder), and commonly identified as a separate entity called Schizoaffective Disorder.

Medical records indicate that Mr. Panetti receives varying medications for his complex psychiatric disorder. In most cases, Mr. Panetti is treated with powerful anti-psychotic drugs, to decrease the symptoms of his schizophrenic though disorder. At other times. Mr. Panetti is treated with antidepressant medications for the depressive component of his Bipolar condition. At yet other times, Mr. Panetti is treated with Lithium to decrease the severe manic symptoms of his bipolar condition. It is noteworthy to this examiner, that Mr. Panetti's clinical course is most effectively treated when he is on a combination of a mood stabilizing drug (Lithium) and an anti-psychotic medication. This combined modality of psychopharmacologic agents makes sense, given the presence of his Schizoaffective Disorder.

The course of Schizoaffective Disorder is similar to both Schizophrenia and Bipolar illness. In short summary, schizophrenia is a chronic disease which almost always has some degree of activity throughout a person's life, and the varying symptom severity determines the degree of impairment. For example, individuals who suffer from a disturbed thought process (loose associations, for example) would have rather severe difficulties in communicating with others. On the other hand, suspiciousness of others might not substantially impair an individual's behavior or decision making as it would if the suspicions became very intense and reached delusional proportions. In a similar vein, varying symptom severity, whether it be mania or depression, determines the degree of impairment.

The chronicity and waxing and waning course (above) is most evidence in Mr. Panetti's medical records; it is also observable during Mr. Panetti's entire trial. Medical records reveal that Mr. Panetti stops taking his own medication in the months preceding his trial. As a result, and factoring in the stress of a trial upon any defendant much less one representing himself, any clinician can reasonably foresee that Mr. Panetti's symptoms would worsen, i.e., that Mr. Panetti would become more ill. The trial record corroborates my clinical acumen. Having the opportunity to review Mr. Panetti's testimony during his trial, I can observe his underlying psychiatric disturbance –word for word. Additionally, observing his communication in court reflects upon his overall though processes and how it has been impacted by psychiatric disease. There are numerous incidents in Mr. Panetti's trial when he exhibits flight of ideas and grandiosity (symptoms of mania), but there are even more examples of looseness of associations and tangentiality in his thought processes (symptoms of Schizophrenia). Example after example of the court repeatedly redirecting Mr. Panetti to stay on line with relevant evidence is a stark example of how he cannot think and communicate rationally because of his underlying disease. It is certainly understandable from a lay point of view how frustrating it was for the court, particularly not appreciating that Mr. Panetti's disease was the reason for his inability to comply with the judge's requests.

It is evident to this examiner that both the manic and schizophrenic components of Mr. Panetti's Schizoaffective Disorder are alive and well during his entire litigation. Prior to his actual trial, and keeping in mind that Mr. Panetti discontinues his psychiatric medication, I am not surprised to find that Mr. Panetti's symptoms return

(as I state earlier). Looking at past medical records when Mr. Panetti is previously ill, records show symptoms of persecutory delusions, auditory hallucinations, looseness of associations, thought tangentiality, and idiosyncratic and sometimes bizarre thinking. As a result, I would expect that some, if not all, of these symptoms would similarly return to a more active form when Mr. Panetti was no longer on medication. His trial testimony – word for word – shows remarkable looseness of associations and tangentiality throughout his trial. These are symptoms of his disease and he cannot reasonably control them without the aid of medications. Without medications treating these symptoms, it is understandable how Mr. Panetti would lose his ability to communicate accurately and rationally with others. This is obviously the case reviewing his testimony. In Mr. Panetti's pretrial motion to represent himself, he gives no reason *why* in the actual court document. However, without medication and in the midst of active schizophrenic disease, Mr. Panetti perceives that others are against him just like previous records indicated earlier. Records reflect that Mr. Panetti's wife, the Texas Rangers, the community of Fredericksburg, the judge, and Mr. Panetti's attorneys are all against him. Under the influence of persecutory delusions, I cannot reasonably appreciate how Mr. Panetti's waiver of his own attorney could be a reasoned and rational choice.

It is clear to the examiner that Mr. Panetti retains *personal choice* throughout his trial proceedings. This is not unexpected, since even the most psychotic individuals I have seen in my career still have personal preferences and choices. However, the clinical crux of a reasoned choice is determined by whether a person's psychotic thought process is involved in that decision making process.

Hypothetically speaking, an individual like Mr. Panetti could have a delusion that only law enforcement officers wearing sunglasses were trying to harm him. In this scenario, being in a court room would be less threatening to him. In Mr. Panetti's actual scenario, he believes (delusionally) that everyone that he encounters in Fredericksburg is intent on giving him an unfair trial, and it is this reasoning that underlies his choice in filing a motion to waive his counsel. As a result, Mr. Panetti's choice is affected by his psychiatric disease (in this case, a psychotic condition) and cannot represent a truly reasoned choice.

Although the trail [sic] court accepts Mr. Panetti's waiver of counsel and allows him to represent himself, Mr. Panetti's testimony indicates that he is cognitively impaired by his own thought disorder. Even though Mr. Panetti's choice to represent himself is a personal decision, his ability to carry out this personal decision is still limited by his psychotic disease. Mr. Panetti's thought disorder renders his thinking incoherent, illogical, and goal nondirected. These three elements in thinking are elements every psychiatrist evaluates in a mental status examination. These three elements are disturbed during Mr. Pantelli's trial. As a result of his thinking disturbance, and whether or not Mr. Panetti expresses a personal choice to defend himself, his ability to comprehend, understand, assimilate, and finally communicate his ideas and perceptions and thoughts to others will all be limited by his psychosis. Under the constraint of such a severe thought disturbance, Mr. Panetti, or any other individual with these same symptoms, would not retain the ability to rationally understand and communicate with his counsel, much less participate in his own self defense. As a result, I

cannot appreciate that Mr. Panetti has a rational understanding of the litigation against him.

In very short summary, Scott Panetti suffers from Schizoaffective Disease, a chronic psychiatric disturbance that requires ongoing mediation management with varying medications of which Mr. Panetti suddenly discontinues several months prior to his trial. As a result of his unmedicated state, Mr. Panetti's disease process deteriorates to such a level that he was subject to persecutory delusions, and severe disturbances in his thinking (and ability to communicate with others). His decision to waive his own counsel was under the influence of persecutory delusions, and his ability to represent himself in court was substantially impaired by disturbances in his thought processes (looseness of associations, et cetera). As a result, Mr. Panetti could not have met the Dusky standard for competency to stand trial.

If I can assist you further, please contact me.

Sincerely,

/s/ Michael R. Arambula
Michael R. Arambula, M.D., R.Ph.

MRA/kb

401 F.Supp.2d 702

United States District Court, W.D. Texas,
Austin Division.
Scott Louis PANETTI, Petitioner,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.
**No. A-04-CA-042-SS.**

Sept. 29, 2004.

Michael Clark Gross, Law Office of Michael C. Gross, San Antonio, TX, Keith S. Hampton, Attorney at Law, Austin, TX, for Petitioner.

Tina J. Dettmer, Office of the Attorney General, Austin, TX, for Respondent.

## ORDER

SPARKS, District Judge.

BE IT REMEMBERED on the 7th day of September 2004 the Court called the above-styled cause for an evidentiary hearing to determine Petitioner's competency to be executed. The parties appeared through counsel, which over the course of two days, presented evidence and oral arguments. Now before the Court is Petitioner's Petition for Writ of Habeas Corpus [# 1]. Having considered the evidence, the arguments of counsel, and the relevant law, the Court now enters the following opinion and orders.

## Background

Petitioner Scott Louis Panetti is currently confined on "death row," in the Polunsky Unit of the Texas Department of Criminal Justice (TDCJ). He has been sentenced to

death for murdering Amanda and Joe Alvarado, the parents of his estranged wife, on September 8, 1992. He brought this, his second application[1] for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on January 26, 2004, after his execution date had been set and he had exhausted the available state court procedures, alleging he was incompetent to be executed. Panetti's attorney had filed a motion under Article 46.05 of the Texas Code of Criminal Procedure ("Article 46.05") in state court on December 9, 2003. On December 23, 2003, the state district judge, after considering the exhibits attached to the motion, denied Panetti's motion on the following grounds:

> [T]he Defendant has failed to set forth alleged facts in support of the assertion that the Defendant is presently incompetent to be executed and has failed to make a substantial showing that the defendant is thus incompetent. The court further finds that the Defendant has failed to raise a substantial doubt of the defendant's competency to be executed on the basis of the said motion and attached documents, as required by Article 46.05(d), Tex.Code Crim. Proc.

Panetti filed a motion for stay of execution in this Court in conjunction with his habeas application, arguing this finding is a decision contrary to clearly established Supreme Court

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[1] Panetti filed his first federal habeas petition in 1999, wherein he alleged fourteen grounds for relief, including claims that he was incompetent to waive counsel and incompetent to stand trial, but not that he was incompetent to be executed. *See Panetti v. Johnson,* Cause No. A:99-CA-260-SS (W.D.Tex. Mar. 9, 2001). This Court's opinion was affirmed on appeal. *See Panetti v. Cockrell,* No. 01-50347, 73 Fed.Appx. 78, slip. op. at 6-8 (5th Cir. Jun. 19, 2003).

precedent, and specifically, *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

The issue before this Court in deciding the initial motion to stay was whether reasonable jurists could disagree regarding whether the state court's decision that Panetti had not made a substantial showing of incompetency which would warrant evaluation of two mental health experts was an unreasonable application of *Ford* and its progeny. Initially, however, Panetti and his attorney failed to include with their motion to stay or federal habeas application the Article 46.05 motion filed in the state court or any evidence of Panetti's current mental status. After this Court denied the first motion, counsel for Panetti submitted a copy of the Article 46.05 application along with his first motion for reconsideration. This motion too was denied as Panetti and his attorney still failed to offer any evidence of Panetti's current mental status. Finally, along with a second motion for reconsideration, Panetti presented evidence to support his contention he was presently incompetent to be executed in the form of the report of a clinical and forensic psychologist, Dr. Mark Cunningham, and the affidavit of a law professor, David Dow, each of whom had observed Panetti and concluded that he suffers from delusions that cause him to misunderstand whether and why he will be executed.

Counsel for Panetti informed the Court that the same evidence had been presented to the state court in a renewed motion to determine his competency under Article 46.05. Therefore, the Court held it appropriate that Panetti present his new evidence to the state court first because at that point, the Court was limited by AEDPA to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had

before it at the time the state court denied Panettis initial motion in December 2003. However, because the execution was scheduled for the following day, February 5, 2004, the Court stayed the execution for 60 days to allow the state court a reasonable period of time to consider the evidence of Panettis current mental state and decide whether he had "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health experts under Article 46.05. Tex. Code. Crim. P. Art. 46.05.

Subsequently on February 23, 2004, relying on Article 46.05(f), the state court entered an order appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. By citing Article 46.05(f),[2] Judge Ables implicitly found Panetti had made "a substantial showing of incompetency" with the documentary evidence submitted. On April 28, 2004, the appointed experts filed their joint report concluding Panetti was competent to be executed. Counsel for Panetti was then ordered to raise any other matters regarding competency by May 21, 2004. On that date, Panetti filed objections to the methods and conclusions of the experts and renewed his motions to appoint counsel, hire a mental health

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[2] Tex. Code. Crim. P. Art. 46.05(f) states: "If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed." Judge Ables's appointment of experts pursuant to this provision can be contrasted with his disposition of Panettis initial motion to determine competency, which he denied "on the basis of the said motion and attached documents, as required by Article 46.05(d)."

expert, and hire an investigator. He also asked the trial court to hold an evidentiary hearing, which this Court has since held was required under the Supreme Court's decision in *Ford*. However, rather than hold the required evidentiary hearing, on May 26, 2004, Judge Ables entered an order concluding, "[b]ased on the aforesaid doctors' reports, the Court finds the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*

This Court held, in its July 20, 2004 Order, that the state court's failure to hold a final competency hearing in which Panetti could present his own evidence constituted non-compliance with Article 46.05. Because the state court did not comply with the statute, the Court concluded its findings were not within the safe harbor created by the Fifth Circuit in *Caldwell v. Johnson,* which insulates state proceedings conducted in compliance with Article 46.05 from habeas attacks on the grounds they fall short of what *Ford* requires. 226 F.3d 367, 374 (5th Cir. 2000). This Court further held, since the state court had determined counsel for Panetti had made "a substantial showing of incompetency," its failure to "receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," was a violation of due process under *Ford*. 477 U.S. at 427, 106 S.Ct. 2595.

On that basis, the Court set an evidentiary hearing to determine Panetti's competency to be executed, pursuant to *Ford*. The Court appointed counsel and authorized funds so that Panetti could obtain investigative and expert assistance.

## I. Standard of Review and Burden of Proof

Ordinarily, the factual findings of a state habeas court are entitled to great deference. For instance, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a petitioner seeks habeas relief in federal court, "[a] state court's findings of fact are presumed to be correct unless the petitioner rebuts the presumption by 'clear and convincing evidence.'" *Patterson v. Dretke,* 370 F.3d 480, 484 (5th Cir. 2004), 28 U.S.C. §2254(e)(1). The Fifth Circuit has expressly held a "state court's determination that a prisoner is competent to be executed is a factual finding entitled to the presumption of correctness under Section 2254(e)(1)." *Patterson,* 370 F.3d at 484; *Barnard v. Collins,* 13 F.3d 871, 874 (5th Cir. 1994). Additionally, no habeas relief may be granted unless the petitioner can show the state court's adjudication of the claim resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *see also Brown v. Cain,* 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied,* 520 U.S. 1195, 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997).

Respondent contends the Court should apply the deferential standards of review codified by the AEDPA in resolving the question of Panetti's competency to be executed. To apply such deference, however, would fly in the face of the Supreme Court's holding in *Ford.* There, seven Justices of the Supreme Court concluded denying a petitioner the right to present, as well as rebut, evidence in making a competency-to-be-executed determination

violates the right to due process. *See Ford,* 477 U.S. at 414-15, 106 S.Ct. 2595 (Marshall, J.) ("[A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. . . . A related flaw . . . is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions."); *Id.* at 423, 106 S.Ct. 2595 (Powell, J., concurring) ("As Justice O'CONNOR states, '[i]f there is one fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'"). Justice Powell specifically noted state proceedings deficient in this respect "invite[ ] arbitrariness and error," and on that basis, he concluded no presumption of correctness should attach to the state court findings.

The Court in *Ford* was faced with a prior version of §2254, however, in which the statutory presumption of correctness was expressly made inapplicable in cases in which "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." *See* 28 U.S.C. §2254(d), subsequently amended by Antiterrorism and Effect Death Penalty Act (AEDPA) of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996); *Ford,* 477 U.S. at 423, 106 S.Ct. 2595. Despite the fact that the current version of the *statute* omits this particular express limitation on the presumption, Justice Powell's holding is still relevant. After all, Justice Powell based his conclusion that no presumption of correctness should attach to the state court's determination, not only on the statute, but also because "[the statutory] standard is no different from the protection afforded by procedural due process." *Id.* at 424, 106 S.Ct. 2595. Because the Court's holding in *Ford* was grounded in part in the Constitution, subsequent

changes to the habeas statute should not alter its determination that no deference may be afforded to state court competency-to-be executed proceedings resulting in a denial to the petitioner of an effective right to participate. One of the primary justifications for the Court's due process holding in *Ford* was the likelihood such proceedings would produce erroneous factual findings. It would be absurd then to presume the correctness of findings that are constitutionally suspect precisely because they are likely to be incorrect. Deference to constitutionally inadequate state court proceedings would only serve to taint this Court's evidentiary proceedings.

Nonetheless, Respondent contends deference is required, relying on *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001) for its holding that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme." *Id.* at 946. Such reliance is misplaced. Although the court in *Valdez* was unwilling to conclude "a full and fair hearing" is a prerequisite to AEDPA deference *generally*, there is no reason to believe that the Fifth Circuit intended to hold the AEDPA somehow overruled the Supreme Court's constitutional holding in *Ford*. This Court concludes that *Ford*, as a matter of due process, demands a de novo review of the petitioner's competency to be executed.

Finally, as to the burden of proof, the Court assumes, without expressly holding, the petitioner must demonstrate, by a preponderance of the evidence, he is incompetent to be executed. In light of the parties agreement at oral argument that a simple preponderance is the relevant standard of proof, as well as the fact that the Court's ultimate findings would remain unchanged if any higher

burden were applied, the Court need not formally reach the issue.

## II. The Evidentiary Hearing

This Court, two juries, and various appellate courts have found Panetti to be competent during various stages of the criminal proceedings against him and during his prior efforts to obtain habeas relief. Those determinations, however, did not involve the question of Panettis' competency *to be executed,* nor did they then purport to resolve any doubts that might subsequently arise about his present competency. Nonetheless, those determinations are clearly relevant to the question of his present competency to be executed. As the Supreme Court made clear in *Ford,* such prior findings may serve as the basis of a presumption of a petitioner's competency under state law. In this case, however, since the state court concluded counsel for Panetti made "a substantial showing of incompetency" to overcome the presumption created by the prior adjudications of his mental state, this Court concludes the evidence adduced at the evidentiary hearing in this proceeding should be of primary significance in this case.

This Court called an evidentiary hearing on September 7, 2004, and it lasted two days. Counsel for Petitioner presented the testimony of four expert witnesses: Dr. Mary Alice Conroy, a clinical and forensic psychologist; Dr. Susana Rosin, a clinical psychologist; Dr. Seth Silverman, a psychiatrist; and the aforementioned Dr. Cunningham. The State presented two expert witnesses, Dr. Parker and Dr. Anderson, appointed to evaluate Panetti by the state habeas court, and three fact witnesses, Major Steven Miller, Lieutenant Terri Hill, and Victoria Williams, TDCJ

corrections officers who have had the opportunity to observe Panetti at his place of incarceration, to varying degrees, in recent months and years. All of the expert witnesses based their testimony on their respective meetings with Panetti, interviews with people that know him, and Panettiš medical and custodial records.

The expert witnesses, on both sides, seemed to agree Panetti suffers from some form of mental illness. They disagreed, however, about the extent (and diagnosis) of his illness as well as the extent his illness interferes with his ability to understand the reason for his impending execution. Certain facts may be regarded as established, however. First, the testimony of the witnesses, in sum, supports a finding that Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. Although Dr. Parker and Dr. Anderson concluded that some portion of Panettiš behavior could be attributed to malingering, their testimony merely casts doubt on the extent of Panettiš mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

Each of the expert witnesses weighed in on his or her view of Panettiš understanding of the fact he is to be executed and the reason for it. All agreed Panetti understands he is going to be executed and, at least implicitly, they agreed he is capable of understanding that fact.

Despite their converging points of view on this basic point, their opinions diverged on a number of other points.

There was disagreement among Panettis own witnesses about whether Panetti has an understanding of the murders he committed. Dr. Conroy stated Panetti would say almost nothing about the subject, and what he did say came across as rather garbled. Nonetheless, she was able to testify, he seemed to be saying that God had nullified it, God had forgiven him, God had wiped the slate clean – in fact he uses the phrase wiped the slate clean –and it would be sinful to talk about that because its no longer an issue."Dr. Rosin testified so mewhat more clearly Panetti knows he killed his wifes parents, basing her conclusion on details of the murders that he went over with her during their meeting. Dr. Silverman testified, on the other hand, that Panetti told him he believed another individual named Sarge committed the murders of his in-laws, and Panetti took no responsibility for them. Dr. Silverman also indicated he did not find it unusual for three different people asking the same question to get three different answers from someone with Panettis condition.

The witnesses further disagreed about whether Panetti understands the reason he is being executed. Significantly, no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed. Dr. Parker and Dr. Anderson both testified Panetti has the capacity to understand this fact but were unable to reach a formal conclusion that he did, in fact, understand it. Their inability to reach this formal conclusion apparently can be largely attributed to the fact Panetti did not tell them he understood he was to be

executed for committing the murders during their interview with him.[3] Dr. Parker and Dr. Anderson based their view that Panetti is capable of understanding the reason for his execution on their determinations about his cognitive functionality generally. For example, Dr. Parker testified that in letters Panetti writes to friends and family, he often communicates lucid, socially appropriate thoughts. Dr. Anderson testified that although many of Panettis responses to her questions in their meeting were abstract and indirect, she regarded them as logical. She further stated Panettis "capacity to understand the Bible, to understand history, movies, other things that he referenced, tells me he has the capacity to understand the facts of why hes being executed." The observations of Major Miller, Lieutenant Hill, and Ms. Williams corroborate Dr. Parkers and Dr. Andersons view that at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion.

The witnesses for Panetti did not dispute he has the cognitive functionality to communicate coherently much of

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[3] Dr. Parker and Dr. Anderson regarded Panettis failure to confess this understanding as deliberate manipulation and uncooperativeness. However, based on the testimony of the other witnesses who have interviewed him as well as TDCJ records, there is little evidence to suggest that Panetti behaved any differently with Dr. Parker and Dr. Anderson than he has with any other mental health professional who has interacted with him. Specifically, each witness testified Panetti told them he believes that he is to be executed for preaching the Gospel. Dr. Parker and Dr. Anderson treated this answer as nonresponsive while the others were willing to regard it as a product of a genuine delusion on Panettis part. The consistency of Panettis behavior does not necessarily serve to disprove Dr. Parkers and Dr. Andersons contention that Panettis behavior can be partially attributed to malingering, but it at least rebuts Respondents insinuation that Panetti only refused to talk with *his* experts.

the time. Their testimony about his condition was that, despite the fact he can think and communicate coherently about certain subjects and in certain environments, he suffers from delusions about the world around him. Significantly, they testified he suffers from the delusion that the real reason for his execution is his preaching the Gospel. Dr. Conroy testified Panetti believes his execution is part of a "spiritual warfare" which has been going on since the 1980s.

Dr. Conroy and Dr. Rosin both testified, despite his delusions, Panetti understands the State's stated reason for seeking his execution is for his murders. They based this testimony on what Panetti told them in their meetings with him. Ultimately, both concluded, however, Panetti does not appreciate the connection between his crimes and his execution. They apparently reached this conclusion from the premise that, as a result of his delusions of persecution, he disbelieves the State's stated reason for executing him. Dr. Silverman testified that in his view, Panetti does not associate his execution with the murders he committed in any way. This view was informed, however, at least in part, by the fact that Panetti did not specifically tell Dr. Silverman he understands the State's stated reason for seeking his execution.

Dr. Cunningham testified, although Panetti understands that the State of Texas is going to execute him, his delusions prevent him from recognizing the State as "a lawfully constituted authority." Rather, according to Dr. Cunningham, Panetti sees the State "as being in league with the forces of evil to prevent him from preaching the Gospel."

## III. *Competency to be Executed*

The Fifth Circuit has set forth the standard for competency to be executed as follows: "[A]ll we require is that a person know the fact of his impending execution and the reason for it." *Fearance v. Scott,* 56 F.3d 633, 640 (5th Cir. 1995) (citing *Barnard,* 13 F.3d at 876 n. 2). Counsel for Panetti do not dispute Panetti knows the fact of his impending execution. Their contention is Panetti's incompetency is grounded in his failure to understand the reason for his execution. As to that portion of the incompetency test, the facts of this case arguably require a more nuanced standard than what has developed by any federal appellate court to date. There is evidence in the record to support a finding that Panetti is *capable* of understanding the reason for his execution, as well as evidence to support a finding that, in fact, he does understand (at least at some level) *the state's stated reason* for his execution. Nonetheless, the record also would support a finding, not necessarily inconsistent with the first two, that in another possibly relevant sense, Panetti does not, in fact, know or understand the reason for his execution.

The Fifth Circuit cases dealing with competency to be executed are less than clear about *how* a district court is to apply the standard in a factually complex case such as this one. First, although the Fifth Circuit in both *Fearance* and *Barnard* at some point stated the appropriate question is simply whether a petitioner *knows* the fact of and reason for his execution, at other points, the court has also suggested the inquiry might involve a more substantial determination than what the petitioner factually knows. For example, the court has at least purported to adopt the standard enunciated by Justice Powell's concurring opinion

in *Ford,* which sets out the required mental state of a person to be executed in somewhat more detail:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

*See Garrett v. Collins,* 951 F.2d 57, 59 (5th Cir. 1992) and *Lowenfield v. Butler,* 843 F.2d 183, 187 (5th Cir. 1988) (both quoting and relying on this excerpt from Justice Powell's concurrence in *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring), in denying competency-to-be-executed habeas relief); *see also Fearance,* 56 F.3d at 640 and *Barnard,* 13 F.3d at 876 n. 2 (holding that the Fifth Circuit has adopted the Powell concurrence as the standard for competency to be executed).

Counsel for Panetti suggests this Court should treat Justice Powell's concurrence in *Ford* as controlling law. However, despite the fact the Fifth Circuit has purported to adopt Justice Powell's concurrence, it is clear from the court's holdings it has adopted his standard only in a limited sense, and furthermore, it has not adopted his reasoning at all. Justice Powell's proposed standard that only those who are "unaware of the punishment they are about to suffer and why they are to suffer it" are incompetent to be executed, standing alone, is somewhat ambiguous. On the one hand, as discussed further below, the Fifth Circuit has, without any discussion of the potential broader import of the statement, apparently interpreted

Justice Powell's use of the concept of "awareness why" to require no more than knowledge of the required factual predicate for an execution. On the other hand, at least one federal district court has pointed out that Justice Powell's use of the term "why," outside the context of his argument and if interpreted broadly, could be stretched to require even that a defendant receives a metaphysical explanation for his punishment.[4] Justice Powell's reasoning, which gives context to his proposed holding, however, makes clear that, at least for him, the requirement that defendants have an awareness of why they are to suffer execution derives directly from the proposition that "the retributive goal of the criminal law is satisfied" when the defendant "perceives the connection between his crime and his punishment." In this sense, counsel for Panetti are correct to suggest the Powell concurrence requires more than a bare factual knowledge of the reason for execution -rather, it requires that petitioner's understanding of the reason for his punishment is sufficiently clear that the retributive goal of the law may be satisfied. Ultimately, however, Petitioner's problem is that the Powell concurrence is not, in fact, controlling law.

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[4] The Court there wrote:

> The defendant cannot be entitled to such an explanation. Metaphysics is not sufficiently advanced to provide a satisfactory rationale. Moreover, a fundamental notion of justice prevents the defendant from receiving this reasoning. An ordinary person, who never possessed the tenacity to kill another human, may contact a fatal disease. This person will never understand why he is to die. . . . If the innocent person cannot receive this explanation, why should an individual who made a conscious decision to end another human's life?

*Martin v. Dugger*, 686 F.Supp. 1523, 1571 & n. 21 (S.D.Fla.1988).

As a number of courts have pointed out, Justice Powell's concurrence in *Ford* was decisive in that, in conjunction with Justice Marshall's plurality opinion, it gave rise to a majority holding in the case. However, the opinions of the plurality and Justice Powell converged only with respect to two holdings: (1) that the Eighth Amendment prohibits execution of the insane and (2) that the state procedures for determining competency at issue in the case did not meet the requirements of due process. *Ford,* 477 U.S. at 418, 424, 106 S.Ct. 2595. The plurality represented by Justice Marshall specifically declined to reach a holding on the question of what standard should be used to determine incompetency for the purposes of the Eighth Amendment prohibition. *See id.* at 418, 106 S.Ct. 2595 (Powell, J., concurring) ("The Court's opinion does not address [the meaning of insanity in the context of the Eight [sic] Amendment prohibition]"). Thus, the Powell concurrence does not operate as binding Supreme Court precedent on what standard governs competency to be executed.

Furthermore, although the Fifth Circuit has purported to adopt the Powell concurrence without any apparent express limitation, its holdings suggest it has not adopted Justice Powell's "retributive goal" requirement. This Court can find no instance in which the Fifth Circuit has suggested, other than its quotation of the language of the Powell concurrence, that the competency inquiry includes a determination of whether the petitioner's knowledge or understanding of the reason for his execution is sufficient to permit the court to conclude that the retributive goal of the criminal law may be satisfied. Had the court applied this "retributive goal" standard, at least some of its cases may have come out differently. In *Fearance,* for instance, the court held the following facts,

standing alone, were sufficient to establish competency to be executed: "Petitioner testified that he knew the date scheduled for his execution, the date of the offense for which he was on death row, that he was sentenced to die for murdering Larry Faircloth, and that the murder was alleged to have occurred during the course of a burglary." *Fearance*, 56 F.3d at 640. The court made clear no further inquiry into the petitioner's knowledge or understanding of his execution or the reason for it was required. *Id.*

The Fifth Circuit in *Barnard* was forced to deal with the competency of a petitioner who, like Panetti, suffered from delusions of persecution. There, the state habeas court had found the petitioner in the case's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia." *Barnard*, 13 F.3d at 876. Despite the fact the petitioner's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded his knowledge of the relevant factual predicate, that "his pending execution was because he had been found guilty of that crime," was sufficient to support the state court's legal conclusion he was competent to be executed. *Id.* Although the court stated it was following the Powell concurrence in reaching its conclusion that the standard for competency had been satisfied, it did not even suggest the presence of an issue with respect to its "retributive goal" aspect. *Id.* Had the court determined the "retributive goal" inquiry was required, the result it reached may have been different. At the very least, the state court's findings with respect to the petitioner's delusions would have given rise to an arguable issue about whether his understanding of

the reason for his execution was so distorted that the retributive goal of the law would not be satisfied by his execution.

Ultimately, the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution. Turning now to the case before it, the Court finds the following facts to be established:

> First, Panetti is aware he is to be executed. This fact is undisputed, and each of the expert witnesses agreed he is aware of his impending execution.

Second, although there was some disagreement on this point, Panetti is aware he committed the murders that serve as the basis for his execution. Dr. Conroy and Dr. Rosin both testified Panetti knows he murdered his in-laws. However, Dr. Silverman expressed doubt about this. The Court notes Dr. Silverman seemed to base his doubts, in large part, on the fact Panetti did not demonstrate his awareness by stating he committed the murders during the course of their interview. The fact Panetti did not make such a statement in the course of a single interview is insufficient to demonstrate by a preponderance of the evidence he is unaware of the crimes he committed.

Finally, Panetti understands the State's stated reason for executing him is that he committed two murders. Again, both Dr. Conroy and Dr. Rosin offered testimony Panetti was aware of this fact. Dr. Silverman, though, disagreed on this point too. However, his conclusion Panetti does not understand the State's stated reason for his execution is inextricably intertwined with his determination Panetti is not even aware he committed the murders for

which he is to be executed. Since the Court disagrees with the predicate of Dr. Silverman's determination on this question, it accords his ultimate conclusion little weight.

Dr. Cunningham's testimony, on the other hand, raises a somewhat more difficult issue on this point. He suggests Panetti does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him. His testimony is consistent with that of Dr. Conroy, Dr. Rosin, and Dr. Silverman, each of whom testified Panetti believes the real reason he is to be executed is for preaching the Gospel. However, as discussed above, under the precedent of the Fifth Circuit, a petitioner's delusional beliefs -even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution -do not bear on the question of whether the petitioner knows the reason for his execution for the purposes of the Eighth Amendment.

Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed.

In accordance with the foregoing:

IT IS ORDERED Panetti's Petition for Writ of Habeas Corpus [# 1] is DENIED.

IT IS FURTHER ORDERED the execution of Scott Louis Panetti shall be stayed pending the outcome of the appeal in this case.

---

448 F.3d 815

United States Court of Appeals, Fifth Circuit.
Scott Louis PANETTI, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.
**No. 04-70045.**

May 9, 2006.

Michael Clark Gross, San Antonio, TX, Keith S. Hampton (argued), Hampton Law Office, Austin, TX, for Panetti.

Tina J. Dettmer (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Scott Louis Panetti was convicted of capital murder in the state court of Texas and sentenced to death. Panetti argues that he is presently incompetent to be executed. Based on a Certificate of Appealability issued by the district court, Panetti appeals the district court's denial of federal habeas relief.

## I

Panetti has been sentenced to death in Texas state court for murdering his wife's parents. Shortly before his scheduled execution date, he petitioned the state court for a determination of his competency to be executed. The state habeas court appointed two mental health experts:

Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist. Anderson and Parker filed a joint report, concluding that Panetti knows that he will be executed and that he has the ability to understand the reason he is to be executed. Based on this report, but without holding a competency hearing, the state habeas court held that Panetti was competent to be executed.

Panetti petitioned for a writ of habeas corpus in federal court. The district court held that the state court's failure to hold a competency hearing at which Panetti could present evidence was contrary to *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). On that basis, the district court held an evidentiary hearing and declined to defer to the state court's finding of competency. Panetti presented the testimony of four expert witnesses: Mary Alice Conroy, a clinical and forensic psychologist; Susana Rosin, a clinical psychologist; Seth Silverman, a psychiatrist; and Mark Cunningham, a clinical and forensic psychologist. The State presented Parker and Anderson's expert testimony, as well as three fact witnesses who had observed Panetti during his period of incarceration.

The district court found that Panetti suffered from "some form of mental illness," which some of the doctors diagnosed as schizoaffective disorder. *Panetti v. Dretke,* 401 F.Supp.2d 702, 707 (W.D.Tex. 2004). Although he has the "cognitive functionality to communicate coherently much of the time," *id.* at 708, he suffers from "grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs," *id.* at 707. In particular, Panetti told the doctors who interviewed him that he believes the State is "in league with the forces of evil to prevent him from preaching the Gospel." *Id.*

at 709. Nevertheless, the district court found based on the testimony of the experts that Panetti is aware that he will be executed, that he committed the murders for which he was convicted and sentenced to death, and that the State's stated reason for exec uting him is that he committed two murders." *Id.* at 711. On this basis, the district court held that Panetti was competent to be executed. *Id.*

## II

In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo. Ramirez v. Dretke,* 396 F.3d 646, 649 (5th Cir. 2005). The district court in this case declined to apply the deferential standard of review ordinarily required by the Anti-terrorism and Effective Death Penalty Act ("AEDPA") because the state court failed to hold an evidentiary hearing as contemplated by *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). Because we affirm the judgment of the district court, we need not decide whether this was error.[1]

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[1] The respondent relies on *Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir. 2001), in which we held that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme."Accordingly, he argues that the state court's finding that Panetti is competent is entitled to deference even though it may have been made without a hearing. Panetti relies on *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), a pre-AEDPA case in which a plurality of the Supreme Court stated

> any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. "[T]he minimum assu rance that the life-and-death guess will be a truly informed guess requires respect for the

(Continued on following page)

Panetti argues that the district court employed an erroneous legal standard in evaluating whether he was competent to be executed. The district court held that it is sufficient that Panetti knows: 1) that he committed two murders; 2) that he will be executed; and 3) that the reason the state has given for that execution is his commission of those murders. Panetti argues that the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the State's reason for the execution. Panetti contends that this understanding is lacking in his case because he believes that, although the State's purported reason for the execution is his past crimes, the State's real motivation is to punish him for preaching the Gospel. Panetti argues that this rule is compelled by *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

In *Ford,* the Supreme Court held that Florida's procedure by which the Governor determined a prisoner's competency in an *ex parte* proceeding violated due process. The standard employed under Florida's statute was whether the defendant had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." *Id.* at 403-04, 106 S.Ct. 2595 (quoting Fla. Stat. §922.07(2)). A psychiatrist who had interviewed Ford testified that he had "no understanding

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basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected."

*Id.* at 414, 106 S.Ct. 2595 (quoting *Solesbee v. Balkcom,* 339 U.S. 9, 23, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting)). Justice OConnor, joined by Justice White concurred, stating that due process required providing such a prisoner the opportunity to be heard. *Id.* at 429-30, 106 S.Ct. 2595 (OConnor, J., concurring).

of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed seriously believed that he would not be executed because he owned the prisons and could control the Governor through his mind waves." *Id.* at 403, 106 S.Ct. 2595. A majority of the Court held that the Eighth Amendment barred executing the insane and that Florida's *ex parte* procedure violated due process. A four member plurality stated that, "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417, 106 S.Ct. 2595. The plurality based its statement on the lack of "retributive value [in] executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" and "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Id.* at 409, 106 S.Ct. 2595. The Court remanded for a *de novo* evidentiary hearing. *Id.* at 418, 106 S.Ct. 2595. The majority did not, however, address what competency standard the Eighth Amendment required.

Justice Powell, believing that the plurality's exposition of the appropriate standard was inadequate, wrote a concurring opinion. After surveying the historical authorities, Justice Powell wrote:

> A number of States have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.
>
> Such a standard appropriately defines the kind of mental deficiency that should trigger the

> Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

*Id.* at 421-22, 106 S.Ct. 2595 (Powell, J., concurring) (footnote omitted).[2] Justice Powell believed that Ford was incompetent under this standard because he did not actually believe that he would be executed. *Id.* at 422, 106 S.Ct. 2595 (Powell, J., concurring). We subsequently adopted Justice Powell's concurrence as the correct standard. *Lowenfield v. Butler,* 843 F.2d 183, 187 (5th Cir. 1988).

The district court in this case relied on *Barnard v. Collins,* 13 F.3d 871 (5th Cir. 1994), a case nearly identical to the one at bar. Barnard sought a certificate of probable cause on his *Ford* claim. *Id.* at 875. Barnard, like Panetti, suffered from paranoid delusions that his execution was the result of a conspiracy against him and not his crimes. As the state court noted:

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[2] A majority of the court recited Justice Powell's position approvingly in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for the proposition that a person "who is unaware of the punishment they are about to suffer and why they are to suffer it cannot be executed." *Id.* at 333, 109 S.Ct. 2934 (quoting *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring)).

> [Barnard] comprehends the *nature, pendency, and purpose of his execution.* [Barnard] knows that he was found guilty of killing a young boy in a robbery in Galveston County and that *his pending execution was because he had been found guilty of that crime.* He knew of the date of his scheduled execution and that it would be lethal injection by use of an intravenous injection. [Barnard's] experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia (emphasis added).

*Id.* at 876 (quoting state court decision). We held that because the state court found that Barnard "knew that he was going to be executed" and why he was going to be executed" the *Ford* standard had been satisfied. *Id.* at 877.[3] The district court's findings in this case are sufficient under *Barnard* to establish Panetti's competency to be executed, and Panetti does not seriously contend otherwise.

Panetti nevertheless argues that *Barnard* is inconsistent with our prior decisions in *Johnson v. Cabana,* 818 F.2d 333 (5th Cir. 1987), *Lowenfield v. Butler,* 843 F.2d 183

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[3] In a subsequent case, this court held that where a prisoner "testified that he knew the date sche duled for his execution, the date of the offense for which he was on death row, that he was sentenced to die for murdering Larry Faircloth, and that the murder was alleged to have occurred during the course of a burglary," he was competent to be executed. *Fearance v. Scott,* 56 F.3d 633, 640 (5th Cir. 1995).

(5th Cir. 1988), and *Garrett v. Collins*, 951 F.2d 57 (5th Cir. 1992), and with Justice Powell's concurrence in *Ford*. We disagree. One panel of this court is generally powerless to overrule the previous decision of another panel. Although we acknowledge that an exception to this rule arises where two panel opinions are in conflict, *Harvey v. Blake*, 913 F.2d 226, 228 n. 2 (5th Cir. 1990), the holdings of our cases are not in conflict.

*Barnard* is consistent with Justice Powell's concurrence in *Ford*. Justice Powell stated, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Ford*, 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring). Justice Powell did not state that a prisoner must "rationally understand" the reason for his execution, only that he must be "aware" of it.

This court first interpreted the "awareness" component of *Ford* in *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987). The issue in *Johnson* was whether the Mississippi state court erred in declining to hold an evidentiary hearing on Johnson's *Ford* claim. Johnson had submitted to the state court evidence that he suffered from various psychological difficulties including amnesia, brain damage, "brain dysfunction," organic brain syndrome, and alcohol dependency, and that he heard voices when he was a child. *Id.* at 337-39. The state court had held that Johnson had not made a sufficient threshold showing that would entitle him to a full hearing. *Id.* at 339. In making that determination, the state court employed a substantially more stringent definition of competency than *Ford* required. *Id.* at 339. Mississippi deemed a prisoner incompetent for execution if he did not have sufficient intelligence

to understand: 1) the nature of the proceedings against him; 2) the crime of conviction; 3) the purpose of the punishment; 4) his impending fate; or 5) any fact that might exist that would render his punishment unjust or unlawful. *Id.* (citing Miss. Code Ann. §99-19-57(2) (Supp.1986)). This court held that Johnson's evidence as to whether he met this standard was equivocal. *Id.* at 340. Accordingly, the failure to hold a full, trial-like hearing did not violate due process. *Id.*

Panetti makes much of *Johnson's* discussion of the *Ford* standard for competency. *Johnson* did state that in *Ford,* "the Supreme Court held that a defendant who could not perceive the connection between his crime and punishment should not be executed." *Id.* at 336. But our interpretation of *Ford's* substantive competency standard was dicta because as noted, Mississippi's standard was more prisoner-friendly than the Eighth Amendment requires. The issue in *Johnson* was, given the Mississippi standard, whether Johnson had a due process right to a full hearing. *See id.* at 340 ("We therefore find that constitutional due process was satisfied by the determination of the Mississippi Supreme Court that its statutory threshold had not been reached is entitled to the presumption of correctness provided by [former] 28 U.S.C. §2254(d).") The constitutional standard for competency to be executed was simply not at issue in *Johnson,* much less the highly unusual factual scenario in this case. Because Johnson had failed to make a threshold showing under the Mississippi standard, the standard applied by the district court in this case, or the standard that Panetti advocates, *Johnson* did not resolve the issue in this appeal.

We next addressed *Ford* in *Lowenfield v. Butler,* 843 F.2d 183 (5th Cir. 1988), which like *Johnson,* concerned

whether the petitioner had made a substantial threshold showing to require a full hearing in state court. According to *Lowenfield,* the *Ford* plurality stated that a prisoner's competency to be executed depends on whether he "comprehends the nature of the penalty' and whether the prisoner's mental illness prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford,* 477 U.S. at 417, 106 S.Ct. 2595). *Lowenfield* then quoted Justice Powell's concurrence for the proposition that the Eighth Amendment forbids the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* (quoting *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring)). Lowenfield's evidence consisted only of a psychologist's opinion that he was a paranoid schizophrenic. *Id.* at 187. By itself, this fell "woefully short of a finding that Lowenfield [was] so deranged that he [was] unaware that he [was] about to be put to death as a result of his earlier conviction and sentence for murder." *Id.* Accordingly, we held that Lowenfield had failed to meet the substantial threshold showing required to necessitate a full hearing. *Id.* at 187-88.

Despite Panetti's reliance on *Lowenfield,* the case is not dispositive. Mere evidence of schizophrenia would not establish that a prisoner was incompetent under either the test that Panetti advocates or the test applied by the district court. *Lowenfield* therefore did not address or resolve whether competency requires a rational understanding of the reason for the execution.

Panetti relies last on *Garrett v. Collins,* 951 F.2d 57 (5th Cir. 1992). *Garrett* concerned an appeal from a stay of execution. Garrett contended that his belief that "his dead aunt [would] protect him from the effects of the sedative

and toxic agents used" during lethal injection rendered him incompetent. *Id.* at 58. Garrett's expert witness testified, however, that his client knew that it was possible for him to die as a result of the State's efforts. *Id.* at 59. We held that, so long as Garrett "(1) understands the nature of the proceedings against him and (2) understands that the state is seeking to execute him and the reasons the state seeks this penalty," he is competent to be executed. *Id.* at 58. That Garrett had some hope that his aunt would save him from death did not render him incompetent. *Id.* at 59. In *Garrett,* we did not address the arguments Panetti raises in this appeal. Garrett solely argued that he lacked an understanding of the nature of the death penalty. He did not contend, nor did we decide what it means for a prisoner to be unaware of the punishment or the reason for it. Because we hold that "awareness," as that term is used in *Ford,* is not necessarily synonymous with "rational understanding," as argued by Panetti, we conclude that the district court's findings are sufficient to establish that Panetti is competent to be executed. *See Barnard v. Collins,* 13 F.3d 871 (5th Cir. 1994).

For these reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 04-70045

---

SCOTT LOUIS PANETTI

Petitioner-Appellant

v.

DOUG DRETRE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

---

Appeal from the United States District Court
for the Western District of Texas, Austin

---

ON PETITION FOR REHEARING EN BANC

(Opinion 5/9/06, 5 Cir., ___, ___ F.3d ___)

(Filed Jun. 8, 2006)

Before HIGGINBOTHAM, GARZA, and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

127 S.Ct. 852

Supreme Court of the United States
Scott Louis PANETTI, petitioner,
v.
Nathaniel QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.
**No. 06-6407.**

Jan. 5, 2007.

Case below, *Panetti v. Dretke*, 448 F.3d 815.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

54

(15)

No. 06-6407

Supreme Court, U.S.
FILED
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# In The
# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

## JOINT APPENDIX
## VOLUME II

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**Petition For A Writ Of Certiorari Filed September 6, 2006
Certiorari Granted January 5, 2007**

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State's Exhibit 6, Evidentiary Hearing in *Panetti v. Dretke*, No. 1:04-CV-042, U.S. District Court for the Western District of Texas (Sept. 7, 2004) ..... II-42

**CORRECTIONAL MANAGED CARE**
**MENTAL HEALTH SERVICES**

Outpatient MH Follow-up

Patient Name: PANETTI, SCOTT L TDCJ#:999164 Date: 05/25/2004 14:15
Facility: POLUNSKY (formerly TERRELL)

**Pt seen due to scheduling error.**

S: The patient reports: he is a preacher and is to deliver the Word of God to those around him. Pt stated he is a born again Christian and wishes to witness to everyone....

O: Observations: Pt was hyperreligious.
Mental Status: anxious; alert and oriented in all spheres; hyperreligious; denies homicidal or suicidal ideation; tall is stature and lower average for weight; good eye contact; Pt would only speak of the Bible and God.

A: Impression: hyper-religious

P: Referral:
F/U:
Schedule Appointment:
Follow up PRN: xxx

**Name of interpreter, if required:**

Electronically Signed by SMITH-MUEHR, JERRIE M MS, LPC on 05/25/2004.
##And No Others##

Procedures Ordered:
MH OP FOLLOW-UP: no diagnosis on axis i/axis ii

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TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

PSYCHIATRIC CENTER JIV

# DISCHARGE/RELEASE SUMMARY

PATIENT'S NAME: PANETTI, Scott TDCJ #: 999164 AGE: 39

UNIT OF ASSIGNMENT: Ellis I MED. CLASS: S3NT

DATE OF ADMISSION: 09/29/97 -10-8-97 REFERRED BY: Jester IV Crisis Management

REASON FOR ADMISSION: This patient was admitted into Jester IV Acute Care I relative to reported loose association and rambling speech. Also, he was said to be quite demanding of others. He was admitted into Jester IV Acute Care I for continued evaluation and treatment.

CLINICAL COURSE: During the course of evaluation in Jester IV Acute Care I, this patient displayed circumstantial speech. Also, he exhibited religious preoccupations. Within the structured environment that is afforded at Jester IV Acute Care I, an improvement in his ability to focus was observed. He complained of auditory and visual hallucinations; however, these were extremely vague. On 10/08/97, this patient demanded to be discharged back to Death Row because he was having trouble dealing with officers. He denied the existence of homicidal and suicidal ideation. Overall, this patient's expressed complaints were inconsistent with his clinical presentation. He was discharged at his own request against medical advice.

CURRENT MENTAL STATUS: This patient was oriented x 3. His psychomotor activity was unremarkable. No gross impairment in speech was noted. The patient's mood was euthymic with broad affect. His thoughts were coherent and goal directed. No suicidal, homicidal, or paranoid ideation was present. Intermittent auditory and visual hallucinations were reported. Delusional activity was questionable. His stream of thought was average. The patient's level of intelligence was believed to lie within the average range. All components of memory appeared to be grossly intact. His impulse control was adequate. The patient's judgement was considered to be limited. His level of insight was questionable.

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** PANETTI, SCOTT L.
**TDCJ No.:** 999164
**Unit:** ELLIS

| Date & Time | Notes |
|---|---|
| 8/27/97 1300 | Interviewed again. SCR. He says that he did not ask to see me (in particular). He says that he has been able to treat his mental problems with his "spiritual" methods. He then launches into a diatribe of his lack of treatment by this department and how it will "all become manifest." When he was told we must confine our discussion to mental health issues he eventually became hostile saying "you are a damn fool, doctor." The session was then Terminated. His appearance was good - clean shaven, haircut, etc. Speech was clear and spontaneous. Mood was predominantly euthymic with no signs of dysphoria. No thought or perceptual abnormalities were observed although he may have adopted some religious preoccupations (e.g. his "spiritual" treatment regimen that is self-imposed and adverse to Jesus and Bible verses). His self-diagnosis of schizo affective disorder appears to be an arrogant and narcissistic ("in special") gesture if not another game (like his previous diagnosis of Schizophrenia + multiple personality). (A) NO Axis I, Axis II traits predominate. No acute psychiatric distress, in fact, no distress at all. (P) 2 RV. yrs<br>Michael R. Gillaspie, M.D. |
| 9/9/97 1345 | Report to team of above visit and chart review by team. Decision made to bring him down next week for visit with psychiatrist. (P) RV x 1 wk for clinic.<br>Michael R. Gillaspie, M.D. |

MHLTH - 032

Please sign each entry with status.

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Ronnie Scott
TDCJ No.: 999164
Unit: Terrell (01)

| Date & Time | Notes |
|---|---|
| Filed<br>Date: 8-21-97<br>Time: 1435<br>Initials: LR | I-60 "I need medicine for original Schizoaffective disorder and to be assigned for work (my jaw Rad is my Treatment now). I sent an request to you (that Ms. Gilliland answered) "we" only get 2 hour recreations 5 days for work. This month it 0800-1000 hours so please don't call me during recreation. Thank You!<br>Response: The psychiatrists have determined that you are not suffering from a psychiatric illness requiring the medication you have demanded. Regarding your recreation period, we have no call out (escorts) list for day and see inmates as they are brought to our attention. If you elect to stay in recreation rather than come for a requested session that is your choice.<br>DR Cobler DO 08/20/97 1530 |
| 8-28-97<br>0700 | SCR Dowd to speak with you concerning your Schizo affective disorder (Mrs. Gilliland has answered your I-60's x3). Plan: Appt. Scheduled for 8-29-97. CA Cooling RN |

MHLTH - 033

Please sign each entry with status.

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Parotti, Scott
TDCJ No.:
Unit: Ellis I

| Date & Time | Notes |
|---|---|
| 3/3/97 1000 | Pt. Refused Scheduled appt this date. Rv PRN. Lisa Heaton, M.A. |
| 3/12/97 0800 | SCR "MS. Heaton for treatment of Schizophrenia". Plan: Appt. 3-13-97. Brenda Gancher/Cmsr |
| 3/12/97 0900 | (3) Pt. Seen this date per SCR above. He discussed his frustration over "perceived injustices" within the TDCJ System. (especially his "perceived lack of Medical and Psychiatric treatment) He states that he wants to be treated for Schizophrenia and is upset that the Psychiatrist does not agree with his diagnosis. MS. appears to be within the normal limits & functioning adequately, no acute distress. Rv PRN. Lisa Heaton, M.A. |
| JW 3/12/97 0800 | ~~SCR "~~ ERROR Pt |
| 6-9-97 0730 | SCR - "I need to speak with you ASAP" PLAN: Appt 6-10-97. Brenda Gancher/Cmsr |
| 6/10/97 0900 | (3) Pt. Seen this date per SCR above. He discussed his history and the events which led to his incarceration. He talked about his feelings that he is Schizophrenic and the possible |

Please sign each entry with status.

MHLTH - 036

ISM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Powell, Scott
TDCJ No.: 999164
Unit: Ellis (ELS)

| Date & Time | Notes |
|---|---|
| 2/10/97 1530 | The individual was scheduled for this morning on SCR after Friday 2/7/97. He was offered opportunity to come to office by CO III Wilkerson. When asked he denied "I will go to see Ms Heaton, but will not see any of the rest." The writer was asked if he was refusing to which he responded in the affirmative. PLN |
| 2/12/97 0800 | SCR Requesting to see MS. Heaton to discuss Dr. Arambula's visit. Plan: Appt. 2-13-97 w/Ms. Heaton Brenda Sanchez/Caseworker |
| 2/13/97 0900 | ① Pt. keep this date per SCR. He discussed his perceived lack of medical treatment including psych services. He also discussed lack of staff interaction with specific complaints of officers who he feels are mistreating him. ② Mood was appropriate affect broad. Pt. is oriented to person, place, time. Pt. is Alert & Cooperative. Thinking is adequate. No Acute distress. Pt. is oriented to "west of Texas" RN - PSN. Lisa Heaton M.A. |
| 2/21/97 0800 | SCR "For treatment therapy to discuss my mental health". Plan: ~~2-24-97~~ 2-24-97 Tuesday. Brenda Sanchez/Caseworker |
| 2/24/97 3:00 | ③ Pt. keep this date per SCR above. He discussed his hepatitis vow and his continued Refusal to cut his hair and beard. ④ Mental Status is Somber |

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HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Panetti, Scott Louis
TDCJ No.: 999164
Unit: Ellis

| Date & Time | Notes |
|---|---|
| 11-27-96 0715 | Sick: Madam, I was at UTMB Galveston for an appointment on Scheduled date last Tuesday. I need to see you ASAP" Plan: Appt. 12-2-96. Brenda Panetti/Cayenne. |
| 12/2/96 2:00 | Pt. seen briefly bedside per Sick Call Request. Pt. is in no Acute distress and functioning adequately, MS-WNL. He will be rescheduled for tomorrow AM. Lisa Hasbun, M.A. |
| 12/3/96 0900 | S) Pt. seen this date per Sick Call Request. Pt.'s chief complaint today centers around medical concerns, (perceived lack of medical attention), and his self described schizophrenia and refusal to obtain specific Psychotropic medication. Mood euthymic, thought logical but loosely associated. Pt. allowed to "vent" schizophrenia, functioning adequately, no Acute distress. Rx PRN. Lisa Hasbun, M.A. |

MHLTH - 040

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# CLINIC NOTES

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Parrish, Scott
TDCJ No. 999164
Unit: Ellis I

| Date & Time | Notes (Chart 284) Dr. DeHuneja's |
|---|---|
| 11/5/96 3:30 | Pt. seen this date per sick call request. Pt. discussed "perceived injustices" within the TDCJ system especially with regard to medical and psychiatric care. Pt mood even with broad affect. Loose associations of thought/ ideas as pt. would go from one topic to another rather abruptly. Pt. advised to "vent" frustrations (A) functioning adequately, no acute distress. (D) RN Dallas Lisa Watts, R.N. |
| 11/8/96 1020 | I-60 - "I wish to speak with you A.S.A.P @ your convenience." (Dated "NOV 5 1996"). Reply - You were seen on the date you wrote this request, and no need for treatment was discussed. (P) TRN Michael R. Gilmore, Ph.D |
| 11/12/96 1330 | Chart review indicates error in entry of 10/1/96 by the undersigned. Note on that date indicates he was not seen as per schedule of 9/24/96 because of "lack of escort". Actually the inmate was off the unit on that date as he was transferred to UTMB Galveston for medical treatment. Michael R. Gilmore, Ph.D |
| 11/13/96 0930 | I-60 + Letter Registry Service RESPONSE: "We have received your request asking reference to [illegible] the patient referenced have already attended sick call-out at your unit. This request asks for a review, but no specific |

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MHLTH - 042

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: RANSTI, SCOTT
TDCJ No.: 799164
Unit: TULIA OR

| Date & Time | Notes |
|---|---|
| FILED<br>DATE: 10-23-96<br>TIME: 1405<br>INITIAL: PC | SICA: "I'm requesting weekly or at least bimonthly psychotherapy with a female therapist as it is more comfortable for me. Do my records I have show a Mrs Pam Bibby (V.A. Hospital) that has worked best for me. To discuss my mental illness." 10/21/96 1045 hrs REC<br>Signature MD |
| | REPLY: "10/21/96 - Your request has been referred to my office for response. Staff you have been seen & overall numerous times that we have NOT found any psychiatric disorder or thing that you would need weekly sessions for. The efforts we have offered in the past to you - you have rejected. Dr. Gibson saw your again recently & found nothing to indicate anything to treat. WHAT SPECIFIC PROBLEMS DO YOU NOW REMAINING TO?<br>Signature MD PSYCH |
| 11/1/96<br>1505 hrs | I-60 - "Madam, I hope this few records (referring to accompanying paperwork) show my need for treatment and at this point "I" trust only yourself. I'll beg not for humanitarian treatment. Please review these A.S.A.P. if the powers that be are of Negative thoughts, interviews, maybe there help somewhere. Reply - The psychiatric services personnel work on a treatment team under my direction along with Mr. G. Mc Gee. We typically do not grant requests to be seen by specific staff members when treatment needs & plans have already been established, which |

Please sign each entry with status. ____ ____ MHLTH - 044

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** PANETTI, SCOTT
**TDCJ No.:** 999164
**Unit:** Ellis

| Date & Time | Notes |
|---|---|
| 9/12/96 1220 | Inmate seen as per SCR above. When asked about his reports of auditory hallucinations he says they may quite possibly be the "best therapy I've had." He says this is true because the voices are "divine." When asked to elaborate he does not answer questions directly and engages in logical but tangential, overly philosophic discourse that evades the original question. He gets moved to talking about medication which he seems to be requesting but won't say so directly. He says he wants to prove his sobriety but offers no meaningful explorations. He says he wants someone to talk to. (D) Individual thoughts are logical, but loosely associated. Answers to questions are vague, approximate, and/or evasive (A) R/O malingering Vs Factitious Disorder. The former appears to be most likely given his history of substance abuse providing motivation for malingering to get psychotropic medication. (P) RV x 1 wk. |
| PV | Michael R. Allen, M.D. |
| 9-17-96 0830 | [illegible] |

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MHLTH - 048

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** Forest, Scott A.
**TDCJ No.:** 555164
**Unit:** Ellis (D/R)

| Date & Time | Notes |
|---|---|
| Page 1 (cont'd) Init: DV | presents to assistant with MD. It is equally interchangeable with each other, primarily one of which is required daily. There is also a figure 8 which should be applied long over the gastric. He appears to be smoking and regimen for "schizophrenia" due to his ability to function. Dr. Yip has constantly tried to help to get identified as to the interim to the appropriate [illegible] and required. The family denied to be diagnosed from consult if he was not going to go seen by MD and during the natural. The psychiatrist and team agreed. |
| (2) | DISCHARGE DIAGNOSIS: |
| | AXIS I: No Major Mental Illness<br>Bowel Syndrome / Eating Disorder NOS likely |
| | AXIS II: Obsessive Personality Disorder Mixed |
| | AXIS III: None known |
| | SIGNATURES: Brenda Dancher (CA-DSR); [signature] MD<br>A Cooling RN |
| | PSYCHIATRIST'S SIGNATURE: [signature] |

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**MHLTH - 051**

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PANATH, SCOTT ALAN
TDCJ No.: 895164
Unit: ELLIS (10/K)

| Date & Time | Notes |
|---|---|
| FILED | DISCHARGE STAFFING (16 JUL 96 / 1330 HRS) |
| DATE: 7-23-96 | Pt was seen by the treatment team for a return |
| TIME 1315 | staffing session. He had continued to be an oppositional |
| INITIALS: ac | & demanding inmate, who had maintained a manic presentation, |
| | fabrication symptomatology & episodic confusion since his |
| | arrival to the unit. He has been supportively addressed |
| | & been attempted to utilize objective criteria in an |
| | effort to help r/o dispositional issues/conditions & |
| | clarify goals. He refuses to cooperate with his |
| (1) | original plan for work-up & reliability/objectivity |
| | of the instruments. He returned the same type of behavior |
| | at J-II when we sent the unit for a second opinion |
| | at a psychiatric inpatient hospital setting. He has returned |
| | to be seen as a non-psychotic, chronic personality disorder |
| | who at most is a GANSER SYNDROME & FEIGNING BRAIN |
| | DAMAGE SYMPTOMATOLOGY. He has been observed |
| | struggling against efforts for aggressive pursuits & past |
| | when approached by tech staff for chronic physical |
| | issues. There was a lot of emphasis on his past & present |
| | as a documentation of MPD symptomatology. His family |
| | was on at length also about the manner in which his reported |
| | different personalities will shift moments to minutes & |
| | at least in the way I could testify to sessions. |
| | He had several times attempted such shifts here with |

with status.

MHLTH - 052

# CLINIC NOTES

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** Parretti, Scott
**TDCJ No.:** 999164
**Unit:** Ellis I

| Date & Time | Notes |
|---|---|
| 7/16/12 (wed) | and he walk the he would might to be the of the caseload ; I book himself spitally. . O: Alert oriented, woman, uncooperative, organized in way we dot psych wtl. may to the mood = un E agg aff -- + I Wan ⊖ wt RTC pw |

ROMEO S. YAP M.D

MHLTH - 053

Please sign each entry with status.

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PATETTI, SCOTT
TDCJ No.: 199164
Unit: ELLIS (D/R)

| Date & Time | Notes |
|---|---|
| 7/9/96 (cont) (2) PC | Pt states that the "changes in my brain" will be checked if I am to be tested for my mental illness. Pt still does not appear to be in any acute distress and the degree of what we see as actual AND IS pathology is debatable at best. RV: 4 wks Skye Kellett PA |
| 7/9/96 | 1330 error B Birdwell hsm. H5A-9 (S) need medicine as infection is getting bad again. (P) error B Birdwell hsm Clinic appt. scheduled. B Birdwell hsm |
| 7/16/96 0950 | S: Pt seen & evaluated. He stated that he is trying himself & spiritually. Went back to his record in statistic clerk that he was Dx as a schizophrenic, contrary to record stating that he was Dx for alcohol abuse, cannabis, polysubstance abuse, & is currently D/C. Explained to him that these are all the Dx he had of in statistic stating that the records are all messed up. He had not been truly honest. Since he got back from SHU Cell, clearly that the meds don't agree with him. He had been observed & monitored on a very regular basis. No overt psychosis / psychotic phenomena was noted. During the interview period, till his eyes started to water with that because he was not honest truly with his meds, he must be observed by the team & the med. He then stated that if he can't get off |

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MHLTH - 054

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** Pannell, Scott A
**TDCJ No.:** 599164
**Unit:** Bells (D/K)

| Date & Time | Notes |
|---|---|
| FILED | Disciplinary Case Review # 14719 + 31692: (11 Jun 96/1500) |
| DATE: 6/18/96 | She does need more removed written to the |
| TIME: 1830 | initial m/s writing for p/s 2.02. Both |
| INT: BR | cases were cleared for administrative |
| | disposition |
| | [signature] MD |
| 6/26/96 | Disciplinary Review # 31366: |
| 1530 | No reason to preclude for p/s 2.02. [signature] |
| | [signature] MD |
| 6/31/96 | Disciplinary Review # 36199 |
| 1500 | No reason to preclude for p/s 2.02 [signature] |
| | [signature] MD |
| 7/8/96 | Disciplinary Review # 45547: |
| 1230 | No reason to preclude for p/s 2.02. [signature] |
| | [signature] MD |
| 7/9/96 | The inmate was brought to the Office for regular review. He |
| 0945 | has a full beard and is clean, cooperative and goal-directed. He |
| | is now requesting to be put back on the "medication VA Rel |
| | me on". He is reporting the symptoms of "illusions, |
| (1) | delusions and disjointed as before. He is well |
| | oriented to person, time and place and is generally coming |
| | to clinic for visitation with the psychiatrist. Denies any |
| | homicidal ideations. He is making efforts to possibly "stay off by the wall |
| | I should stay with the other people". (CONT) |

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MHLTH - 055

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** PANETTI, Scott
**TDCJ No.:** 999164
**Unit:** Ellis (I/R)

| Date & Time | Notes |
|---|---|
| 6/18/96 1000 | The inmate was in office complaining that the med Judicial on the unit is upset by not giving to B Lic. He is still angry at not getting Depakote for his "Schizophrenia". The writer is discussing appointment of not getting off it's the fact his "religious freedom is upset". I explained to writer Depakote is not psychotropic. He is upset that he was not to receive Depakote and that 1992 book is a dispute. Still the writer states that Depakote which upset him is his safety + post druggs. AV JWKO |

MHLTH - 056

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Panetti, Scott
TDCJ No.: 999164
Unit: Ellis

| Date & Time | Notes |
|---|---|
| 6/5/96 1305 | Inmate seen as per disciplinary cases # 960306078 and # 960303194 for refusing to groom. He says he has taken a "Nazarat vow" and has "re consecrated his hair." He further states that his "religious vows" of late are an alternative to him not getting the medical and psychiatric treatment he thinks he needs. He complains about his treatment by medical and psychiatrics and wants his previous treatment. His mental status is WNL, but he is tangential in his speech and conversation. He is cleared to participate in disciplinary without restrictions. MP<br>Michael L. Gillenwater, M.D. |
| 6/10/96 1345 | Inmate requested presence of psychiatric service at his disciplinary for absent infractions. He attempted to use the disciplinary hearing as a platform to criticise his medical + psychiatric treatment. Once the disciplinary conditions which did not include the offense was explained, he was dismissed. (C) He was clear + logical in the hearing and displayed no symptoms of mental illness other than Axis II behaviors. (A) Doubt Axis I diagnosis as he is clear cognitively and manipulative. (F) as previously scheduled. Counselor discharge from counselors MP<br>Michael L. Gillenwater, Ph.D. |

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# CLINIC NOTES

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** Pruitt, Scott
**TDCJ No.:** 999164
**Unit:** Ellis

| Date & Time | Notes |
|---|---|
| 5/16/96 1400 | Pt was scheduled to report of Ms Brown because he had acts I-60 explaining that he is not getting specific types of treatment to be started he needed. He is depressed as they will be. I explained to him that he would see a doctor. Pt is not showing signs of being an appointment penalty duties including the possibility of psychosis, refuses at this a medication. KV: to schedule |
| 5/21/96 1020 | DISCIPLINARY GRASS # 19378: There is no reason to preclude pts P/S 2.02. Cleared for hearing. |
| 28 MAY 96 0930 | Pt was scheduled for routine office visit. When brought down to office he refused to go in with the other T/T. It was explained that he was to be seen today. He went on + on "about with 7 times," "Ms Hutton removing him I bring a religion / afg mistakes" and exceptions. [O] the MD is good with all issues that he was thinking of he was dumb. He is being appointed and apparently just playing games [A] Pt's [P] DC should be we would see him next Tuesday available as a [T] ② will also separate ending ③ NAP 6/11/96 RV: 3 mos |

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MHLTH - 058

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# CLINIC NOTES

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** [illegible], Scott
**TDCJ No.:** 559164
**Unit:** Ellis (D/R)

| Date & Time | Notes |
|---|---|
| 4-25-96 | Compliance check. Error |
| 0730 | error |
| 5/7/96 | Pt was scheduled for routine office follow-up. This |
| 1500 | morning he should the exam officer "did not Read |
| | if he was going to want to see for office visits" after |
| | receiving prior. After that they will take all |
| | he should see [illegible] Bedford," tell MA called to |
| | date that I need my [illegible] neptune therapy today." |
| | He returns to room & will satisfied and fully |
| | appointed letter I regarding. No routine |
| | Issues. |
| | RN: 3 WICS |

MHLTH - 059

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Randall Scott
TDCJ No.: 599164
Unit: Allred (WF)

| Date & Time | Notes |
|---|---|
| 4/16/96 (cont) | Inhibited affect in ROM when he "attributes full responsibility with illness to the 'illness making boys'" he is wrong and has rech. He will have a disjointed, tangential relation & how Thorazine and the prohibited substance could have "cause some more effects". This appeared to be strictly conjecture & theorizing. Made MHMR appointment & WNL. Topics we discussed & bringing a record reports. Pt could recite a brief abstract rule "some, wanted - she but" etc WNL content. |
| (2) | III. DIAGNOSTIC IMPRESSION:<br>AXIS I: Deferral (799.9)<br>AXIS II: Antisocial Personality Disorder (301.7)<br>AXIS III: None Known<br>IV. RECOMMENDATIONS:<br>We will continue to follow pt for safety. We are still attempting to get Offender F/U Forensics, which is pt small concern. Pt is NOT on meds and is doing quite well. Symptoms described with one in Tx. |

MHLTH - 060

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CSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Rowton, Scott
TDCJ No.: [illegible]
Unit: [illegible] (D/R)

| Date & Time | Notes |
|---|---|
| FILED | Disciplinary Case #224828: (26 MAR / 1030) |
| DATE: 3/27/96 | Subsequent to O/P staff's removal of gym work |
| TIME: 1600 | assignment for D/V report we discussed how. No |
| INITIAL: [illegible] | Y room to preclude for P/S 2.02. |
| 4/8/96 | We received a response to VA request at Tomah, |
| 1430 | Wisconsin. They stated they had no records |
| | at had forwarded them to VA Kerrville. |
| 4/8/96 | She inmate was scheduled for contact to Chaplain's |
| 1600 | office and the school due to shortage of |
| | escort officers is unavailable. Rescheduled |
| | for contact for next week. |
| 4/16/96 | She S contacted Officer and interested in an appropriate |
| 0830 | Religion. He was well attired and in fairly good spirits. |
| | He is NOT taking any medication and believes his |
| | request is due to "medium hype / white spirit" he was |
| | around his neck. He signed the release for |
| | "Mental Health". He is in no acute distress. |
| | RN: 3 wks |

MHLTH - 062

Please sign each entry with status.

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PONETTI, Scott
TDCJ No.: 599164
Unit: Ellis (10/R)

| Date & Time | Notes |
|---|---|
| 3/25/96 1130 | Pt is scheduled for appt. He states he has appt for 2 weeks to be brought to office. Has appts [illegible] to go to [illegible]. Will attempt to get him on a MC Clinic tomorrow, pt was informed. If he is upset over not getting appt, [illegible] will make possible. Explained with appt to remind patient. [illegible] RN: 2 wks |
| 3/26/96 0950 | S: Pt is waiting to see [illegible] appt with [illegible] Psych. Pt states he has not been fully honest with [illegible] & does not want to continue talking with [illegible]. Pt wants to have psychotherapy only on his request. Pt states he does not need [illegible] O: WD/WN [illegible] Lungs: CTA's no [illegible] noted. [illegible] A: [illegible] P: [illegible] psychotherapy |

ROMEO S. YAP M.D

MHLTH - 063

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# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PANETTI, JOHN
TDCJ No.: 999164
Unit:

| Date & Time | Notes |
|---|---|
| 3/7/96 cont'd | - claimant he has not been taking Depakote - "it doesn't help" him + doesn't want to take it. He takes Prolixin + tolerates it.<br>Pt mentation normal, ~~oriented~~ aware of circumstantial, grandiose ?? ideas, interacts well, talkative, ~~[illegible]~~ suicidal, fair insight + judgement. Discussed with him obligation to unit give benefit of doubt + cont. him on Prolixin. Pt will receive CPAP shortly so DC for leave + I will prepare Interdisciplinary team to determine further diagnosis + treatment. |
| 3-19-96 1445 | I/M returned to Ellis from CMC on 3-18-96. He has an appt. w/ Dr. Dillingham on 3-21-96. Psych med current. — Mooring PA |
| 3/21/96 1548 | INMATE SCHEDULED FOR RETURN TO UNIT, BUT NOT SEEN DUE TO NO ESCORTS AVAILABLE. |

MHLTH - 064

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HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** RANETTI, S.L.
**TDCJ No.:** 999164
**Unit:** Ellis

| Date & Time | Notes |
|---|---|
| 2/22/96 1230 | (S) Inmate seen as per SCI referral on Sibutad was sent this date. His nose is swollen and red. He says he is not taking his medicine (Depakote) or Trilafon. He says the medicine he was taking with the VA + the dosage levels gave him "tremendous relief." He also says he wants to be put back on. (O) Mood normal is usual. No signs or symptoms of mental illness. His thoughts are clear, verbalizations are coherent. He presents his arguments well. (A) Looks like malingering. No Axis I present. (P) Inmate became upset that his request for immediate "treatment" was not met and became verbally abusive. Sent to chart to psychiatrist to review inmate request for medication change. Richard T. Gilbreath, Ph.D. |
| 3-5-96 1330 | Estelle RMF Clinic Screen. SIAH. Hx of psych tx. Recently (2/27/96) given a "no axis I diagnosis" See PRN. R Colyer, CSW III |
| 3/7/96 1130 | 37 y/o WM referred by medical. - personnel records from Jester & outpatient progress records. Shared list of questions about his diagnosis. - during interview claims to receive injections from VA + Kerrville State Hospital |

MHLTH - 065

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HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PANETTI
TDCJ No.: 999164
Unit: ELLIS (D/R)

| Date & Time | Notes |
|---|---|
| 2/12/96 1245 | Pt was seen on routine follow-up. He is requesting to have his records sent to MHMR. He was advised that he needs to sign a MR release form for this and to get signed release. He also states that he is NOT taking the Depakote prescribed 3 weeks. He is refusing MH meds to get his mental/psych meds switched to the psychiatrist (Dr. Yap) on the unit "Crowell". He promptly refused again to sign his consent form after he verbally consented to open to the meds. He is stating that he will sign after he gets his meds at "the right moment". His speech is mostly good, he is cooperative, mood is mostly effectively. He seems to be intoxicated today. He is still upset with Lieutenant [illegible] who was a witness of a disciplinary "does you & her you". He still appears down, frustrated, but is quickly brought back with direction to regard to positive issues. |
| | avs 2 mo RV [illegible] MD |
| 2/27/96 1700 | SCR(2) "See Dr. Yap for treatment." and "Mr Hester, I respectfully request an interview to discuss treatment for my mental illness." Pt'd + scheduled w/ Gallegos for 2/27/96. [illegible] Gallegos, M.D. |

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MHLTH - 066

HSM - 1 (Rev. 5/92)

J0174

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Parrett, Scott
TDCJ No.: 999164
Unit: Ellis

| Date & Time | Notes |
|---|---|
| 1/23/96 (cont) | the request of both lawyers go to the court for the other [illegible] or [illegible] can be put in charge as the person to work on. [illegible] with. [illegible] to [illegible] himself a long incident. [illegible] with. [illegible] right / [illegible] [illegible] [illegible]

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** PAVETTI, SCOTT
**TDCJ No.:** 999164
**Unit:** LEWIS (D/A)

| Date & Time | Notes |
|---|---|
| 4 JAN 16<br>0845 | Pt seen in office with escort visit. We discussed his care lengths he desires to be treated for his "Schizophrenia", "depressive disorder" & "mental illness". He stated he has taken from 5-10 yrs. that he needed Clozaril but that it "could only be given at Skyview". He said he is good natured when he wants to get his way & that he is mostly ill and needs medication. Pt seemed lost at times between both parts & Having to deny psychosis to Cogntl. and then immediately look to him & stated auditory. Pt is NOT as expected as we originally thought might be the case. There is a distinct possibility that we need to further deny Axis I thinking there are delusional/psychotic processes & delusional thinking. The "auditory" that he is so adamantly insists "is" are 5 girls Hebrew & country girls". "They sing in Hebrew dreams from (Hebrew)". When the pt is engaged in simple conversation & his voices seem to begin to diminish but pt. seems to spend a lot of energy & "mental illness" that what is "the battle I am in-here". I am also very suspicious that he could be distilled out from remedy & interpret facts. Will continue pt. in WNL Psychosocial |

Please sign each entry with status.

**MHLTH - 072**

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PAUL III, S
TDCJ No.: 539164
Unit: Ellis (OR)

| Date & Time | Notes |
|---|---|
| 27 Dec 95 1000 | Received the charted transition from results at J-IV (c/m + a/c). It is very interesting to note that the team in both places had the same dilemma in how aggressive is making down a dual diagnosis. It is sad they have tried Rx on the regimen he is so existedly upset (urged a "cocktail". This reminds me of a differential diagnostic test is checking for results. There is no "I" written transition but the feeling is the diagnosis is c/o ad (Provisional) addict that is on after depot. He was not upset by perfusion of more than is often as is rare — I would remind that the yellow slip we all use to type) orders. Will not check. RV: O WP, JP ON IVR (if we are to get done today) — ORG |
| 1/2/96 0955 | S: Pt seen & re-evaluated after dialysis from JIV. He was seen by Tx team who seem to think that he could also be malingering & could be some significant down today. He did not complete the tasks as he told them eg, I would not recognize a today.<br>When seen today, he tries to act confused. When told that a "Dr. Yag" got him in and why he was in JIV |

Please sign each entry with status.

MHLTH - 074

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: PAGOTTI, S.
TDCJ No.: 999164
Unit: DALLAS (OK)

| Date & Time | Notes |
|---|---|
| 7 Dec 95 (Sun) (2) | Inmate was entering writing a letter. He is also showing evidence of thought intimidation. He is not posing any suicide gesture, but is making comments on how difficult it was to write. Will continue ongoing assessment given for 8 Dec 95. Inmate was instructed for his own safety to cease writing letter - x/o MD & Sch. Transf J-IV 8 Dec 7th Squad Transf to Upp 4 Ors am. |
| 12-22-95 1030 | Rec'd from J4 E meds - orders cont. per T.O. of Dr. Yap. Scheduled for 12-27-95 E MD. Gilliland. — Cooling RN |

MHLTH - 076

Please sign each entry with status.

HSM - 1 (Rev. 5/92)

# CLINIC NOTES
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

**Name:** PANETTI, S.
**TDCJ No.:** 999164
**Unit:** Ellis

| Date & Time | Notes |
|---|---|
| 10/26/95 cont | response and a reflex response. This exhibits his thought + perceptual processes are intact and that he tends to be concrete. He may have some loosening of his thought processes, but this appeared to be exhibited as in part to evaluate the existence of mental illness. The protocol offers little support for an MR & I Diagnosis. Michael R. Schwartz, Psych |
| 11/28/95 0945 | S: Case discussed c Dr Tam., NO referral nor request for services was given to Dr Tam. Part mental retard. Hx is MHMR + provided tht was invalid ~~and~~ 2° to intentional effort to appear psychotic. No mention of psych was mtl. during the interim period<br>O/E I None<br>A: Flu prev<br>(Over) |
| 7 DEC 95 0830 | She ~~and~~ S was seen again request a SCR regarding desired to meet Dr Mrs. He was into the room talking incoherently + responding. As I began to ask questions pertaining to how he was doing, he immediately began asking lucid questions but not to why he was not being treated. We discussed his Records and I showed him that none of the hospitals have yet sent anything I needed. He remained well controlled during the interview + kept on at one point that he is angry I retired + hates I "Schizophrenic" + "MHMR" |

Please sign each entry with status.

MHLTH - 078

HSM - 1 (Rev. 5/92)

# CLINIC NOTES

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

Name: Pannell, Scott Allan
TDCJ No.: 599169
Unit: Hilltop (D/R)

| Date & Time | FILE IN CHART WHEN LOCATED Notes |
|---|---|
| FILED DATE: 10-26-95 TIME: 0945 INITIAL: AC | This D/R inmate was seen in office by both Dr. Gilbreath and this writer on 25 OCT at 0800. He was brought to office by escort at request of SGT Patterson. The inmate was reportedly complaining bodily about some pain & "crushed glass" at his lack of psychotreatment. We listened to his complaints of his continuing nightmares but having been medicated, denied desire to volunteer at numerous & ongoing psychiatric visits. He claimed to hear on his having been a Schizophrenic by a "less competent doctor". He said remained convinced he was victim discriminated against & disenfranchised as a Schizophrenic. He was explained Dr Gilbreath's intent to protect his civil rights. He requested to secure for a legal visit with attorney. He is in acute distress & does ability to control agents & actions however quite stabilized. Richard R. Gilbreath, DMD Michael R. Gilbreath, DMD |
| 10/26/95 1130 | Inmate Escorted to office to give Psychiatric INKBLOT TEST with inmates consent. The inmate produced an unworkable protocol as he was evasive on the isolated portions of the test. I believe this evasiveness was intentional and not due to florid psychosis. The responses he did give were two popular, numerous personal |

Please sign each entry with status.

MHLTH - 079

HSM - 1 (Rev. 5/92)

TEXAS DEPARTMENT OF CORRECTIONS

**SHORT STAY PSYCHIATRIC ADMISSION RECORD**

(72 HOUR OR LESS)

PANETTI, SCOTT 999164

PATIENT ID

**PSYCHIATRIC HOSPITALIZATION OF MORE THAN 72 HOURS MUST BE CONVERTED TO LONG FORMS**

**PSYCHIATRIC HISTORY** (TO INCLUDE REASON FOR REFERRAL) / PRIMARY THERAPIST This 37 year old Caucasian male was received on Jester IV Crisis Management on 12/12/95. He was referred from Ellis I Unit by Dr. Yap. Reason for referral were presented by Steve Gilliland the unit psychologist as possible psychotic disorder and the need for second opinion. Nursing admission note reflected this patient was oriented X's 1, denied any suicidal ideation, appears to be delusional and verbalized auditory and visual hallucination. Freeworld psychiatric history reveals a previous treatment at the Starlight in Kerrville State Hospital for psychiatric substance abuse. This patient was also treated at Kerrville Va Hospital in 1986. Evaluation in his brown chart reflected symptom of schizoaffective disorder and treatment previously at the Waco VA with medication of Trilafon, Elavil, and Cogentin. Follow up phone call to the family Mr. Ozumba was able to confirm wit the patient's father a previous history of psychiatric treatment. The patient's father also shared with our social worker that the parent's had difficulty communicating with their son as times he utilized different names and identities.

**MENTAL STATUS EXAMINATION** (PRIMARY THERAPIST) This 37 year old Caucasian male appears to his stated age. He stands about 5'11" and weighs approximately 200 lbs. His general attitude was cooperative and he maintained appropriate eye contact. His speech varied in terms of volume and speed, His affect was mostly flat and his mood was unhedonic. His thoughts were loose and disorganized. His thought content reflected disorganized thinking, bizarre ideation, visual and auditory hallucinations, reference to different names and identities but no active homicidal or suicidal ideation or plans. His insight into his symptoms were poor, judgement appears to be good. This patient was a challenge by the treatment team regarding the authenticity of his symptoms he did not become angry nor did he react and he maintained his own preoccupation with his psychotic symptoms. ASSESSMENT mental status this patient was seen and assessed daily by the Crisis Management treatment team. This patient presented loose and disorganized who at times referred to different →

**ASSESSMENT** (D & E TEAM) ↑

**DISCHARGE DIAGNOSIS** (D & E TEAM) Axis I R/O 295.70 Schizoaffective Disorder; R/O 295.90 Schizophrenia undedifferentiated type, R/O V65.20 Malingering (Provisional)

**PLAN** (PRIMARY THERAPIST) Discharge this patient to his unit of assignment on his current prescribed medication of Trilafon and Depakote with recommendation for the receiving unit unit evalute on 30 days or that these medication had any effect in ameliorating his curren symptoms.

**MHLTH - 088**

MA ACP IV

SIGNATURE OF PRIMARY THERAPIST (PSYCHOLOGIST) — DATE — SIGNATURE OF D & E PSYCHIATRIST — DATE

HS-67 H. Gadban, MA, PA ACPIV 12/19/95 H. Patel, MD 12/19/95

PANETTI, SCOTT #999164

Continuation of Mental Status Examination:

...d he prescribed Trilafon, as well as Depakote for medication. This patient willingly cooperated and took the medication as prescribed. Also while in Crisis Management this patient did not behave in any aggressive manner and his bizarre disorganized thinking was consistent throughout our daily interviews and psych aide observation and communication with the patient. With the absence of imminent danger to self and others and the patient uncooperation the testing process was decided to discharge this patient back to his unit of assignment on his currently prescribed medication.

MA ACP IV

MHLTH - 089

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: PANETTI, SCOTT<br>TDCJ#: 999164 |
|---|---|
| 12/14/95 BI-24 | Patient reported that he did complete his MMPI and then he tore it up and flushed it down the commode. His reason was that he couldn't answer some of the questions honestly because he had ambivalence about the answers. Patient also reported he was physically and sexually abuse as a child. Acknowledge to the staff that the questions were posed recent phone call to his father revealed an acknowledgement of multiple hospitalizations, strongly suggesting that they were psychiatric admissions rather than substance abuse or chemical dependency treatments. However the pt. himself said he had a 6 CD admissions, approximately 5 neuropsychiatric admissions. |
| | DSM-IV DIAGNOSTIC IMPRESSION: In the past the patient has been plagued with multiple different diagnoses. He said the DX of 300.14 Mood Disorder, he has been diagnosed with a schizophrenic disorder and I am leaning towards malingering. However we don't have that much information which is all the interviews are inadequate. He is very circumstantial and tangential and part of the treatment team believes that he is telling the truth and part of it doesn't. We are going to ask for a second opinion from A/C team for diagnoses, treatment and disposition. |
| | R. Orr, MD/rbarrientos 12/14/95 |

MHLTH - 095

SM-75 (Rev. 2/92)

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: Parelli, Scott<br>TDCJ#: 999164 |
|---|---|
| 12-14-95 (cont) | and occasionally irrelevant answers were due to intentional evasiveness or actual thought d.o. is not entirely clear: but as "pressure" interview continued, he began to exhibit fatigue (and became more abstract and loose(?) Mood self-described as "frustrated". affect blunted. Denies SI/HI or intent. "I do want to die -- but not even the most remote parts of me have ever or will ever hurt myself intentionally." Yet he added "Scott resents the suicide watches -- I've been dead 2x before -- do not fear it." Attention, concentration fairly adequate, but he exhibits exquisitely autistic preoccupation of even thought processes/content. (General intellectual functioning appears at least average, & apparent capacity (and fondness for!) abstraction & metaphor use of language is decidedly odd. Appetite okay. "I don't sleep |

MHLTH - 099

HSM-75 (Rev. 2/92)

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: Panetti, Scott<br>TDCJ#: 999164 |
|---|---|
| 12-14-95 (cont.) | who presented as courteous and displayed monotonic, stylized speech. He assertively opened the interview c a rambling, tangential, circumstantial diatribe. (eg.- "I read Dr. Orr's belt buckle -- hard to see at a distance -- thought it said 'Stand Tall. Walk in Peace' - like a code I saw on my pick. carton - I saw 3 ravens -- and a very contented bunny rabbit" -- have a Warrior Woman in Washington etc. etc.) Re-directed to focused chronology of tx; he provided more relevant organized (accurate) responses but still tended toward tangentiality, circumstantiality. Interspersed into c multiple refers to "Search" "Wounded Sunbird" "St James" "Rapture" "Scott". Also made multiple references to religiosity ("only want to go where God directs me" -- "I have a Native American ministry" -- |

MHLTH - 100

HSM-75 (Rev. 2/92)

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: Panetti, Scott<br>TDCJ#: 999168 |
|---|---|
| 12-14-95<br>16:30 | Code B - Consultation Note:<br>37 y.o. W/M referred to Crisis from E-1 Death Row. He arrived on DR 10-3-95 after incarceration since 1992 at county jail. Convicted of 2x capitol murders (of his parents, per DR intake data). The chief complaint from referral source was "R/O MPD. R/O Schizophrenia". Assessment at E-1 since arrival included Rorschach and MMPI-2. Rorschach unscorable due to masked evasiveness on inquiry phase. (Examiner suspected it was intentional). MMPI-2 deemed invalid 2° to apparent over-reporting response set (no scores specified in record.) Nonetheless, subject reported extensive Psych hx c multiple hospitalizations, 1980-89 at Starlight Village (4x), Kerrville S.H. (x2?) Waco VA, and outpatient VA care) c other CD admits. |
| 12-21 | Have chart includes documented support for the hx c variable dx: Chronic Undifferentiated Schizophrenia versus Schizoaffective D.O. (c polysubstance dependence). |

MHLTH - 102

HSM-75 (Rev. 2/92)

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: PANETTI, SCOTT<br>TDCJ#: 999164 |
|---|---|
| 12/13/95 B1-24<br>0808 | Patient is still very circumstantial and evasive, he refuses to stay on the study or the treatment team thinks this is looseness of thought association and part of it thinks that this is contrived evasiveness. The patient keeps talking about various alters, he is unable to be consistent about when the alters showed up and who they were. Mostly what I could get Scott from birth and then at age 16 or 17 Ranahan, Montana cowboy, age 17 Sarge appeared in the Navy and then at age 28 the James brothers James 1 and James 2 and then he went back to something about wounded sunburn has been with him since he was an infant. We will come back later and try to get a more consistent history. Patient did not finish the MMPI yesterday but he will complete it today. As far as amenities all that he is going get from admissions amenities will be a mattress.<br>R. Orr, MD/rbarrientos 12/13/95 |
| 12/14/95 0835 | S: I did sit but I took it before and felt I was lying to myself.<br>O: Sitting sunkside wrapped in seclusion blanket handcuffed to rear.<br>A: Pt is labile this morning. At present on no psych drugs. Attitude belligerent. Says "One Creator Order God" but "problems self and etc help me." Pt noted delusional speech rambling. Typically @ age 6 drown and electrocuted school c 16. Pt reported abuse Pt at present does not appear a reliable interviewer. Confused basic [illegible] |

Thomas Allen

MHLTH - 105

ISM-75 (Rev. 2/92)

7.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: PANATTI, SCOTT<br>TDCJ#: 999164 |
|---|---|
| 12/12/95 @1-24<br>Page 3 of 3 | Again my impression as that we are dealing with a Ganzer syndrome which is a combination of dissociative phenomenon and outright malingering. Kind of a 50/50 modality.<br>PLAN: Do some psychometric testing, continue the interview tomorrow and probably we will have to get an A/C consultation cause we will need more time for monitoring and observation. If this is truly a Ganzer syndrome or he is truly malingering or he is truly a dissociative disorder we will need much more time to monitor and assess to make an accurate diagnoses and initiate an appropriate therapeutic intervention.<br>R. Orr, MD/rbarrientos 12/12/95 |

MHLTH - 108

HSM-75 (Rev. 2/92)

?,

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: PANATI, SCOTT<br>TDCJ#: 999164 |
|---|---|
| 12/12/95 B1-24 | and he started telling us about decoding. I believe he did in fact work as a decoder that |
| Page 2 of 3 | part seems to be true. |
| | Mental status examination revealed a somber somewhat grandiose white male whose speech |
| | was spontaneous it was generally coherent and generally irrelevant and tangential to the |
| | subject. Patient was asked about time and he would give answers in terms of location. He |
| | was asked about public school and he talked about his enlistment into the Navy. He was |
| | brought back to the subject of public school and he started talking about work. He was |
| | very tangential, whether this was conscious evasiveness or looseness of thought |
| | associations the treatment team has mixed impressions about which was which. Calculations |
| | were extremely poor, they were more estimations or actually approximations. He could |
| | subtract 7 from 100 and get 93. When subtracting 7 from 93 he couldn't come up with an |
| | answer immediately but eventually came up with 94. With further prompting he again came |
| | up with 94 with some kind of convoluted number system in which 94 seemed almost |
| | reasonable. Again I felt this was a symptom of approximate answers actual cognitive |
| | disfunction or psychotic or loose thinking. Memory retention and recall, general fund of |
| | information were not tested. Judgement impaired, insight questionable. Again when asked |
| | questions about similarities or abstractions, when asked how is an apple like an orange, |
| | like a yubo boat is to a submarine. |
| | DSM-IV DIAGNOSTIC IMPRESSION: Axis I 799.90 Diagnosis Deferred, R/O Dissociative disorder, |
| | R/O Mood Disorder, R/O Schizophrenic, R/O Malingering, 303.90 and 304.80 Alcohol and |
| | Polysubstance dependence in remission without recovery; Axis II (Provisional) 301.70 ASPD; |
| | Axis III Old bullet wounds and some sort of a fungus infection and currently has |
| | complaints about a rash on the palm of his hand; Axis IV 4; Axis V 45 +/-5. |

**MHLTH - 109**

HSM-75 (Rev 2/92)

7

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONAL DIVISION

# INTEGRATED PROGRESS NOTES

| DATE/TIME | NAME: PANATTI, SCOTT<br>TDCJ#: 999164 |
|---|---|
| 12/12/94 BI-24 | Chief complaint by the referral source psychiatric evaluation and a second opinion. Chief |
| 0808 Page 1 of 3 | complaint by the patient "They could not get my record". He indicated records from the VA |
| | and the freeworld. Patient was transferred without any psychotropic medications. |
| | PRESENT ILLNESS: Patient reported that he was or is disabled. Said he was declared for |
| | social security purposes in 1986. But actually he says he was unaware of any disabilities |
| | other than a mental/emotional disability but unable to describe what he could not do that |
| | any other man with his age and training and education could do. He was unable to answer |
| | that. He kept trying to steer the conversation to a disidentity disorder. He talked |
| | about a wounded sunburn, and talked about Branaham, and talked about Scott. He appeared |
| | to switch from one to the other during the course of the conversation. These switches |
| | were rather rapid, there was a slight change in his vocabulary and his tone of voice. How |
| | much of this was well rehearsed and how much of this was actual switching was not |
| | determined. However I had the distinct feeling that it was contrived. Patient had his |
| | own agenda, he kept turning the interview towards his alters. He seemed to want to |
| | impress us or lead us to believe that he did have alter personalities. |
| | CHEMICAL HISTORY: Patient states that he is a cured alcoholic and cured drug addict. |
| | Freeworld history: He estimates that he has had five neuropsychiatric hospital admissions |
| | and six chemical dependency admissions. |
| | FAMILY HISTORY: Patient denied any family medical history, psychiatric problems and |
| | perhaps only his father had a drinking problem. When asked about his educational |
| | background, his public school. The patient hedged and hedged, hedged and finally we got |
| | the point he is an 11th grade drop out, he got his GED and went into the Navy. He then |
| | started telling us about all of his espionage and counter espionage and work in the Navy |

**MHLTH - 110**

HSM-75 (Rev. 2/92)

**DOUG DRETKE, DIRECTOR – CORRECTIONAL INSTITUTIONS**

**OFFENDER NAME/NUMBER:** **Panetti, Scott #999164**

**EXECUTION DATE:** **February 5, 2004**

**OFFENDER SIGNATURE:** Scott Panetti

A. I have been advised that pursuant to Article 43.20, relatives or friends requested by the condemned offender, who are eligible under the following criteria may be allowed to witness the execution of an offender sentenced to death. The relatives or friends may not exceed five (5) in number. However, a spiritual advisor to the condemned offender may be allowed to witness in addition to the five (5) offender witnesses. The spiritual advisor must be a bonafide pastor or comparable official of the church of the condemned offender's elected religion.

1. M.C. Gross – 106 S. St. Mary St. Suite 260, San Antonio, TX 78205
2. Yvonne Panetti – N. 1009 Marshall, Sheldon, WI
3. Louis Panetti – N. 1009 Marshall, Sheldon, WI
4. Karin Eberhart - Switzerland
5. Tom Panetti – W. 14536 CTH MM, Sheldon, WI
6. **(SPIRITUAL ADVISOR)**

B. I am further advised that the services of an attorney can be provided free of charge to prepare a simple will so I may dispose of my worldly possessions. I have indicated my desires by initialing one of the following:

1. The disposition of my estate is complex and could not be handled by a simple will; therefore, I have made my own arrangements. _____

2. Disposition of my worldly possessions is covered by an existing will. _____

3. Services of an attorney are required to assist me in preparation of a simple will. (Offenders who have $500.00 or more are not indigent and should arrange to hire an attorney to prepare a simple will if they do not want to use the packet or prepare a handwritten will.) _____

4. I do not desire a will. SP

[redacted]

DOUG DRETKE, DIRECTOR – CORRECTIONAL INSTITUTIONS

OFFENDER NAME/NUMBER: Panetti, Scott #999164

EXECUTION DATE: February 5, 2004

OFFENDER SIGNATURE: Scott Panetti

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Frnd 1. M.C. Gross – 106 S. St. Mary St. Suite 260, San Antonio, TX 78205

MO 2. Yvonne Panetti – N. 1009 Marshall, Sheldon, WI

Fa 3. Louis Panetti – N. 1009 Marshall, Sheldon, WI

Frnd 4. Karin Eberhart - Switzerland

Bro 5. Tom Panetti – W. 14536 CTH MM, Sheldon, WI

6. (SPIRITUAL ADVISOR) JESUS CHRIST HOLY SPIRIT GOD

B. I am further advised that the services of an attorney can be provided free of charge to prepare a simple will so I may dispose of my worldly possessions. I have indicated my desires by initialing one of the following:

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4. I do not desire a will. ____

I Desire A Will

DOUG DRETKE, DIRECTOR – CORRECTIONAL INSTITUTIONS

OFFENDER NAME/NUMBER: Panetti, Scott #999164

EXECUTION DATE: February 5, 2004

OFFENDER SIGNATURE: Scott Panetti

A. I have been advised that pursuant to Article 43.20, relatives or friends requested by the condemned offender, who are eligible under the following criteria may be allowed to witness the execution of an offender sentenced to death. The relatives or friends may not exceed five (5) in number. However, a spiritual advisor to the condemned offender may be allowed to witness in addition to the five (5) offender witnesses. The spiritual advisor must be a bonafide pastor or comparable official of the church of the condemned offender's elected religion.

1. M.C. Gross – 106 S. St. Mary St. Suite 260, San Antonio, TX 78205
2. Yvonne Panetti – N. 1009 Marshall, Sheldon, WI
3. Louis Panetti – N. 1009 Marshall, Sheldon, WI
4. Karin Eberhart - Switzerland
5. Tom Panetti – W. 14536 CTH MM, Sheldon, WI
6. (SPIRITUAL ADVISOR)

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3. Services of an attorney are required to assist me in preparation of a simple will. (Offenders who have $500.00 or more are not indigent and should arrange to hire an attorney to prepare a simple will if they do not want to use the packet or prepare a handwritten will.) _____
4. I do not desire a will. SP



BEST AVAILABLE COPY

**DOUG DRETKE, DIRECTOR – CORRECTIONAL INSTITUTIONS**

**OFFENDER NAME/NUMBER:** **Panetti, Scott #99164**

**EXECUTION DATE:** **February 05, 2004**

**OFFENDER SIGNATURE:** _____

A. I have been advised that pursuant to Article 43.20, relatives or friends requested by the condemned offender, who are eligible under the following criteria may be allowed to witness the execution of an offender sentenced to death. The relatives or friends may not exceed five (5) in number. However, a spiritual advisor to the condemned offender may be allowed to witness in addition to the five (5) offender witnesses. The spiritual advisor must be a bonafide pastor or comparable official of the church of the condemned offender's elected religion.

1. M.C. GROSS Att of record,
2. Yvonne Pearl Panetti - MOM -
3. LOUIS J. PANETTI - JACK -
4. KARIN Eberhart (PANETTI soon ex-wife)
5. TOM PANETTI (Brother)
6. **(SPIRITUAL ADVISOR)** _____

B. I am further advised that the services of an attorney can be provided free of charge to prepare a simple will so I may dispose of my worldly possessions. I have indicated my desires by initialing one of the following:

1. The disposition of my estate is complex and could not be handled by a simple will; therefore, I have made my own arrangements. SLP

2. Disposition of my worldly possessions is covered by an existing will. SLP

3. Services of an attorney are required to assist me in preparation of a simple will. (Offenders who have $500.00 or more are not indigent and should arrange to hire an attorney to prepare a simple will if they do not want to use the packet or prepare a handwritten will.) SLP

4. I do not desire a will. _____

C. The attorney(s) handling my execution or stay and/or appeal is:

1. M. C. Gross

2. SAN ANTONIO TEXAS

3. _____

D. I am also aware that a relative or bona fide friend can request, within 48 hours, delivery of the remains of an executed offender. If executed, it is my request that my remains be delivered or handled by: STATE OF TX / T.D.C. Burial NEXT DAY

Whose relationship to me is that of _____, whose address is _____, telephone number _____.

_____
SIGNATURE OF OFFENDER

_____
DATE

_____
WITNESS **(PRINT)**

_____
WITNESS **(PRINT)**

cc: Director's Office
Warden's Office, Huntsville Unit
Public Information

**** ORIGINAL REMAINS ON POLUNSKY UNIT UNTIL DAY OF SCHEDULED EXECUTION.**

**TO:** ALL CONCERNED **DATE:** February 05, 2004

**FROM:** WARDEN'S OFFICE **SUBJECT:** DISPOSAL OF PROPERTY

I, Offender Scott L. Panetti, TDCJ # 999164 have made arrangements with MOM & DAD who lives at Livingston TX to pick up my personal property.

I have $ 50.49 in my Trust Fund Account as of 22JAN04, and would like it to be handled as follows:

LOUIS J. PANETTI
P.O. BOX 1202
LIVINGSTON TX 77351

Scott L. Panetti
OFFENDER NAME (PRINT)

Scott L. Panetti
OFFENDER SIGNATURE

22 JAN 04
DATE

WITNESS: (PRINT)

WITNESS: (PRINT)

**TEXAS DEPARTMENT OF CRIMINAL JUSTICE-ID**
**POLUNSKY UNIT**

OFFENDER NAME AND NUMBER **Panetti, Scott # 999164**

LAST MEAL REQUEST

Hot buttered popcorn cold (welchs type) grape juice
SMOKED VENISON BACKSTRAPS and turkey breast in Lemon butter
garlic sause Lemon butter Hoilday giblet gravy bread
crumb bread dressing
cheese tray with cranburry fuit salad
Blue berry pie with whipped cream
coffee
(1) Panetela ciger → Fresh preferd
Honduran —
NO i repete
NO CUBAN
Cigars

CLOTHING SIZE

I wear western cloth

PANT SIZE: 34 waist / 36 Length

SHIRT SIZE: 44

SHOES: 12 1/2

DOUG DRETKE, DIRECTOR – CORRECTIONAL INSTITUTIONS

OFFENDER NAME/NUMBER: Panetti, Scott #999164

EXECUTION DATE: February 5, 2004

OFFENDER SIGNATURE: Scott Panetti

A. I have been advised that pursuant to Article 43.20, relatives or friends requested by the condemned offender, who are eligible under the following criteria may be allowed to witness the execution of an offender sentenced to death. The relatives or friends may not exceed five (5) in number. However, a spiritual advisor to the condemned offender may be allowed to witness in addition to the five (5) offender witnesses. The spiritual advisor must be a bonafide pastor or comparable official of the church of the condemned offender's elected religion.

1. M.C. Gross – 106 S. St. Mary St. Suite 260, San Antonio, TX 78205
2. Yvonne Panetti – N. 1009 Marshall, Sheldon, WI
3. Louis Panetti – N. 1009 Marshall, Sheldon, WI
4. Karin Eberhart - Switzerland
5. Tom Panetti – W. 14536 CTH MM, Sheldon, WI
6. (SPIRITUAL ADVISOR)

B. I am further advised that the services of an attorney can be provided free of charge to prepare a simple will so I may dispose of my worldly possessions. I have indicated my desires by initialing one of the following:

1. The disposition of my estate is complex and could not be handled by a simple will; therefore, I have made my own arrangements. ____

2. Disposition of my worldly possessions is covered by an existing will. ____

3. Services of an attorney are required to assist me in preparation of a simple will. (Offenders who have $500.00 or more are not indigent and should arrange to hire an attorney to prepare a simple will if they do not want to use the packet or prepare a handwritten will.) ____

4. I do not desire a will. SL

1

C. The attorney(s) handling my execution or stay and/or appeal is:

1. M.C. Gross – 106 S. St. Mary St. Suite 260, San Antonio, Texas 78205

2.

3.

D. I am also aware that a relative or bona fide friend can request, within 48 hours, delivery of the remains of an executed offender. If executed, it is my request that my remains be delivered or handled by:
T.D.C.J. Burial although subject to change upon desire of family members
Whose relationship to me is that of Father Mother,
whose address is Livingston TX,
telephone number .

P.O. box 1202
77351

SIGNATURE OF OFFENDER February 6:19

22 JAN 04
DATE

Mayor S. Miller
WITNESS (PRINT)

M. J. Richie
WITNESS (PRINT)

cc: Director's Office
Warden's Office, Huntsville Unit
Public Information

**** ORIGINAL REMAINS ON POLUNSKY UNIT UNTIL DAY OF SCHEDULED EXECUTION.**

**TO:** ALL CONCERNED **DATE:** **February 5, 2004**

**FROM:** WARDEN'S OFFICE **SUBJECT:** DISPOSAL OF PROPERTY

I, Offender Scott L. Panetti , TDCJ #999164 have made arrangements with Louis & Yvonne Panetti who lives at N. 1009 Marshall, Sheldon WI to pick up my personal property.

I have $ 50.49 in my Trust Fund Account as of 01/22/04 , and would like it to be handled as follows: Louis Panetti.

Scott L. Panetti
OFFENDER NAME **(PRINT)**

Scott L Panetti
OFFENDER SIGNATURE

22 JAN 04
DATE

Major S Miller
WITNESS: **(PRINT)**

Lt. J. Richie
WITNESS: **(PRINT)**

**TEXAS DEPARTMENT OF CRIMINAL JUSTICE-ID**
**POLUNSKY UNIT**

OFFENDER NAME AND NUMBER Panetti, Scott #999164

LAST MEAL REQUEST

Hot buttered popcorn / cold grape juice / coffee

Smoked venison back strap and turkey breast in

Lemon butter / garlic sauce / lemon butter / holiday

Giblet gravy bread / crumb bread dressing / cheese

Tray with cranberry fruit salad / blue berry pie with

Whipped cream

(1) Panatela cigar (prefer fresh Honduran no Cuban

Cigar)

CLOTHING SIZE

PANT SIZE: 34 waist / 36 length

SHIRT SIZE: 44

SHOES: 12 1/2

# TEXAS DEPARTMENT OF CRIMINAL JUSTICE

## PROGRAMS & SERVICES DIVISION

**Polunsky Unit**

***Chaplaincy Department***

## Religious Orientation Statement

*(The following statement of religious preference is offered as an attempt to clarify the religious beliefs and obligational practices of committed offenders. It is intended to inform TDCJ staff of any special needs related to personal faith in order to provide appropriate considerations whenever possible.)*

"I Scott Louis ranahan Panetti TDCJ # 999-164
*(offender's name)*
identify my religious beliefs as the following:" *(Circle one)*

1. Roman Catholic
2. Christian (Non Roman Catholic)
3. Jewish
4. Muslim
5. Native American
6. Other (please identify) Evangelical Christian

*(In the case of some of the above categories, a more specific description of the religion may be appropriate.)*

"I further identify myself as Preacher of "good news" "

"The following individual is my 'spiritual advisor:' Jesus Christ
His Holy Spirit
God

Telephone # _____

"I request a visit with my above named spiritual advisor to take place at the Huntsville Unit, pending administrative approval." ☐ Yes ☒ No

"In witness whereof, I have hereto set my hand this 22 day of JAN (month) 04 (year)."

Scott Louis Panetti 22 JAN 04
*Offender's signature* *Date*

Thomas Cole 1-22-04
*Chaplain's signature* *Date*

COLE

cc: Director of Chaplains
Unit Warden
Huntsville Unit Chaplain
Offender File

044

(3)

No. 06-6407

# In The
# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF FOR PETITIONER

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OR CALL COLLECT (402) 342-2831

## CAPITAL CASE

## QUESTION PRESENTED

Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the State is executing him, and thus does not understand that his execution is intended to seek retribution for his capital crime?

## PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Wayne Scott, Gary Johnson, Janie Cockrell, Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006), affirming the District Court's decision, appears at JA 374-84. The District Court's opinion, *Panetti v. Dretke*, 401 F. Supp. 2d 702 (W.D. Tex. 2004), appears at JA 354-73.

## JURISDICTION

The Fifth Circuit entered its judgment on May 9, 2006, JA 374, and denied rehearing en banc on June 8, 2006. JA 385. Petitioner filed his petition for writ of certiorari on September 6, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth and Fourteenth Amendments, 28 U.S.C. § 2254(d), and Article 46.05 of the Texas Code of Criminal Procedure. The relevant portion of the Eighth Amendment states: "nor [shall] cruel and unusual punishments [be] inflicted." The relevant portion of the Fourteenth Amendment provides: "nor shall any state deprive any person of life . . . without due process of law." The relevant portion of 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The text of Article 46.05 is set out in Appendix A.

## STATEMENT OF THE CASE

### A. Course of Proceedings

Petitioner Scott Louis Panetti was convicted of capital murder for killing his parents-in-law and sentenced to death in 1995 in Texas. On October 31, 2003, after the conclusion of the direct appeal and collateral review proceedings, the trial court set Mr. Panetti's execution for February 5, 2004. On December 10, 2003, counsel for Mr. Panetti filed in state court a motion under Article 46.05, alleging that Mr. Panetti was not competent to be executed. The trial court denied the motion without a hearing, finding that Mr. Panetti had failed to make a substantial threshold showing of incompetence.

On January 26, 2004, counsel for Mr. Panetti filed in federal district court a motion for stay of execution and a petition for writ of habeas corpus raising a competency-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). After some preliminary proceedings, the District Court stayed Mr. Panetti's execution so that the state court would have time to adjudicate a renewed Article 46.05 motion. JA 113-16. The state court ordered the district attorney and habeas counsel to provide it with the names of mental health experts that it should consider appointing under Article 46.05(f). *See* App. A. Counsel for Mr. Panetti provided the court with the name of a mental health expert and filed ten motions related to the Article

46.05 proceedings.[1] Relying on Article 46.05(f), the court appointed two mental health experts – neither of whom had been recommended by habeas counsel – to examine Mr. Panetti. *See* JA 59-60.

The state court judge denied Mr. Panetti's motion to videotape the competency examinations and his motion for discovery. The judge said that he would revisit the remainder of the motions only if both court-appointed experts concluded that Mr. Panetti was competent to be executed. Counsel for Mr. Panetti filed a motion to reconsider, pointing out that the state court's inaction until after the experts had conducted their examinations would moot a number of the motions. JA 61-69. The court never ruled on the motion to reconsider.

On April 28, 2004, the court-appointed experts filed a joint report concluding that Mr. Panetti was competent to be executed. JA 70-76. Despite the judge's earlier decision to revisit the remainder of Mr. Panetti's motions if the experts concluded he was competent, the judge did not rule on any of the motions. Instead, he ordered the parties to raise any other matters regarding competency by May 21, 2004. JA 77-78. Counsel for Mr. Panetti filed objections

[1] Among the motions counsel filed were requests for appointment and compensation of counsel, funds to hire a mental health expert and investigator, discovery, videotaping of the mental health examinations, ensuring procedural due process in the competency determination, and transcription of all proceedings. In the motion for funds to retain an expert, counsel reviewed the procedural due process discussions in *Ford* and concluded that the decision demands "that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination." JA 57. Mr. Panetti's counsel made a similar argument in his motion to ensure procedural due process in the competency determination: that, at a minimum, *Ford* guarantees the prisoner's "right to present expert opinion differing from those offered by State or court-appointed experts." JA 53.

to the methods used and the conclusions reached by the court-appointed experts. JA 79-95. Counsel renewed his motions for appointment of counsel, funds to hire a mental health expert, and funds to hire an investigator. JA 95-97. He also asked the court to hold an evidentiary hearing, as indicated by the plain language of Article 46.05(k). JA 98; *see* App. A. On May 26, 2004, the state court held that Mr. Panetti "has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." JA 99.[2]

In federal habeas, the District Court ordered an evidentiary hearing and granted Mr. Panetti's motion for funds for expert assistance. JA 117-35.[3] After a two-day

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[2] Counsel for Mr. Panetti could not appeal this ruling, because the Court of Criminal Appeals had previously held that it has jurisdiction only to review a finding of incompetence. *Ex parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).

[3] The State argued below that the District Court erred in failing to give the state court's decision the deference demanded by AEDPA. The Fifth Circuit did not address this contention. JA 376 & n.1. The argument lacks merit, because the state court's adjudication of Mr. Panetti's claim was "an unreasonable application of . . . clearly established federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). The state court disregarded Justice Powell's concurrence in *Ford*, which sets out the Court's holding on the minimum procedural due process requirements in determining competency for execution. Although Justice Powell did not undertake to define the precise contours of due process in such proceedings, he did require the states to provide a forum to "receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." 477 U.S. at 427. Despite the state court's finding that Mr. Panetti had made a substantial showing of incompetency, and despite Mr. Panetti's repeated requests for adversarial proceedings by which he could contest the court-appointed experts' opinions, the state court refused to allow any such proceedings. *See* JA 49-53; JA 54-58; JA 65-68; JA 95-98. As a result, the state court decided the competency claim without ever "receiv[ing] . . . from the prisoner's counsel . . . expert psychiatric

(Continued on following page)

hearing, the District Court denied relief on the *Ford* claim, JA 354-73, but later granted a certificate of appealability on the issue. The Fifth Circuit succinctly stated the issue presented on appeal:

> Panetti argues that the district court employed an erroneous legal standard in evaluating whether he was competent to be executed. The district court held that it is sufficient that Panetti knows: 1) that he committed two murders; 2) that he will be executed; and 3) that the reason the state has given for that execution is his commission of those murders. Panetti argues that the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the State's reason for the execution. Panetti contends that this understanding is lacking in his case because he believes that, although the State's purported reason for the execution is his past crimes, the State's real motivation is to punish him for preaching the Gospel.

JA 377. The panel rejected these arguments as a matter of law under the controlling precedent of *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994). "Barnard, like Panetti, suffered from paranoid delusions that his execution was the result of a conspiracy against him and not his crimes," JA 379, but the panel held this delusional belief irrelevant to the question of competency to be executed. JA 380. The panel found *Barnard* "nearly identical" to Mr. Panetti's case, JA 379, and "consistent with Justice Powell's concurrence in *Ford*." JA 381. Because "Justice Powell did not state that a prisoner must 'rationally understand' the reason for his execution, only

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evidence that . . . differ[ed] from the State's own psychiatric examination." 477 U.S. at 427 (Powell, J., concurring).

that he must be 'aware' of it," JA 381, the panel concluded that the District Court's findings were sufficient to establish that Mr. Panetti is competent to be executed. JA 384; *see* JA 384 (holding that "'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding'"). The Fifth Circuit denied rehearing en banc. JA 385-86. This Court granted certiorari on January 5, 2007. JA 387.

## B. Facts Material to the Issue Presented

Justice Powell stated in *Ford* that a condemned inmate "does not make a claim of insanity against a neutral background," because "in order to have been convicted and sentenced, [the inmate] must have been adjudged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court." 477 U.S. at 425-26 (Powell, J., concurring). Certainly, the legal presumption of competency at the time of execution applies in Mr. Panetti's case. Factually, however, it rests upon a frail foundation. Evidence of incompetency runs like a fissure through every proceeding in this case.

### 1. Mental Health History[4]

Unlike Alvin Ford, Mr. Panetti suffered from a severe mental illness long before he ever arrived on Texas's death

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[4] Mental health professionals note that reviewing an inmate's psychological and psychiatric history is an essential component of making a reliable determination of the inmate's present competency for execution. *See, e.g.*, Patricia A. Zapf *et al.*, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist*, 21 Behav. Sci. & L. 103, 106 (2003); Bruce Ebert, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 Law & Psychol. Rev. 29, 47-48 (2001).

row. *Cf. Ford*, 477 U.S. at 401-02. In the decade leading up to the offense, Mr. Panetti was hospitalized over a dozen times in numerous institutions for schizophrenia, schizoaffective disorder, bipolar disorder, depression, psychosis, auditory hallucinations, and delusions of persecution and grandiosity. *See* n.14, *infra* (summarizing hospitalizations). Several weeks before the crime, Mr. Panetti and his second wife Sonja had separated. 31 RR 60.[5] Sonja testified that Mr. Panetti had threatened and hit her. 31 RR 62. At that time, Mr. Panetti had not been taking his antipsychotic medication regularly or continuing his follow-up care at the Kerrville V.A. Medical Center. *See* 37 RR 1552; Federal Petition for Writ of Habeas Corpus, No. 1:99-CV-00260 (W.D. Tex. Sept. 7, 1999) (hereinafter "Federal Petition") (Ex. 14: summary of medical records). On September 8, 1992, Mr. Panetti shaved his head, dressed in camouflage combat fatigues, armed himself with a sawed-off shotgun and a deer rifle, and went to the home of his parents-in-law, Joe and Amanda Alvarado. He shot them at close range with the rifle in front of his wife and daughter. 37 RR 1544-46. He then took his wife and daughter to a bunkhouse where he had been living. 37 RR 1547. He eventually released them unharmed and, after a lengthy standoff with the police, he surrendered. 37 RR 1548-51.

Based on Mr. Panetti's long history of mental health problems, the judge ordered a psychiatrist to determine his competency to stand trial. Dr. E. Lee Simes

---

[5] Citations to the transcript of testimony from Mr. Panetti's capital murder trial and both competency-to-stand-trial proceedings are noted as "RR" ("Reporter's Record"). Citations to the pleadings, orders, and motions filed in the trial court during these proceedings are noted as "CR" ("Clerk's Record"). Citations to the *Ford* hearing held in federal district court are noted as "FH."

reported that Mr. Panetti did not know what year it was or who the President was; had some looseness and tangentiality in his thought processes; admitted to both auditory and visual hallucinations, including seeing Jesus in his jail cell; related chronic delusions marked by religiosity; appeared to have "an odd fragmentation of his personality in describing himself as several different people;" and suffered from "obvious mental difficulties." JA 9-14 (Defense Ex. 44, 37 RR 1429, 1430). Nonetheless, Dr. Simes concluded that Mr. Panetti was competent to stand trial. JA 13.

A competency trial was held on July 28-29, 1994. After the jury deliberated for nearly twelve hours, the judge declared a mistrial. 10 RR 371, 379.[5] After the trial court ordered a change of venue, a new jury heard nearly identical evidence about Mr. Panetti's competency to stand trial. At the second competency trial, Mr. Panetti's defense counsel testified that Mr. Panetti would become delusional and unresponsive to his questions under stress. 13 RR 27. During conversations, Mr. Panetti often said that he felt possessed by demons and had been visited by angels and Jesus in his jail cell. 13 RR 29-31. Defense counsel testified that he had never had a meaningful and rational conversation with Mr. Panetti about the legal issues in the case. 13 RR 34-36, 46.

Dr. Richard Coons, a forensic psychiatrist, found that Mr. Panetti suffers from schizophrenia. 13 RR 60. Dr. Coons testified that Mr. Panetti decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient. 13 RR 61-64. As an example, during one of their meetings Mr. Panetti:

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[5] Notes in the record indicate that the jury deadlocked 9-to-3 in favor of finding Mr. Panetti incompetent to stand trial. 3 CR 290.

> began to talk about scripture and then he began, with no prompting from me, no interjection from me whatsoever, he went from scripture to being in jail in Bell County to the way prisoners look, to the Waco Veterans Administration Hospital. He described patients. He talked about lightning, talked about having been drowned a couple of times, the Lord wants me to help a person, talked about the meaning of life, suicidal thoughts, his mother's prayers, so much to be thankful for, problem marriages, women he's dated, rodeo, drinking, tequila in old Mexico, the YO Ranch, his battle with the bottle, a mescal dream of a bottle with worms in it, dope dealer sitting in the courtroom, Luke, Chapter 13 Verse 33, new saddle, boots, boot maker is dead, hobbles for a horse, an old piece of cotton rope and riding with a lead shank.

13 RR 63-64.[7] According to Dr. Coons, Mr. Panetti had other distractions besides his inefficient thinking: He hears voices that may have "particular religious significance" and others that are "more precise and commanding." 13 RR 65. Although Mr. Panetti was then taking antipsychotic medication that diminished some of the symptoms of his schizophrenia, 13 RR 69-70, Dr. Coons said that Mr. Panetti still suffered from the disorganized thought processes that characterize schizophrenia. 13 RR 75, 77. He said that Mr. Panetti's mind "saddles up and rides off in all directions." 13 RR 85. Mr. Panetti was not

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[7] Shortly after arriving on death row, a medical services worker described a visit with Mr. Panetti: "He assertively opened the interview [with] a rambling, tangential, circumstantial diatribe (e.g. – 'I read Dr. Orr's belt buckle – hard to see at a distance – thought it said "Stand Tall, Walk in Peace" – like a code I saw on my milk carton – saw 3 ravens and a very contented bunny rabbit' – have a Woman Warrior in Washington,' etc., etc." JA II 36 (Respondent's Ex. 3, 1 FH 46, 91) (punctuation in original).

malingering, Dr. Coons testified, because his symptoms were consistent with the psychiatric records beginning in the 1980's. 13 RR 82.

Dr. Simes testified that Mr. Panetti is clearly mentally ill, that his thought processes are tangential, and that he most likely suffers from schizophrenia. 13 RR 144-45, 158. Although he concluded that Mr. Panetti was competent to stand trial, 13 RR 146, Dr. Simes admitted that he recalled Mr. Panetti's delusional, irrational thinking about "gold dust coming down and spiritually filling him," "the demons Dagon and Beelzebub," and "the tinglies." 13 RR 153-54. He also recalled Mr. Panetti's discussion about the four personalities inside him and his belief that the purpose of the competency trial was to provide him with the proper medication. 13 RR 154-56. Because stress exacerbates the symptoms of schizophrenia, Dr. Simes testified that, as the capital murder trial progressed and the stress increased, Mr. Panetti could decompensate and his delusions could render him incapable of assisting his attorneys. 13 RR 163, 172, 174.

The jury found Mr. Panetti competent to stand trial. 13 RR 206-07.

Seven months later, Mr. Panetti experienced his "April Fool's Day revelation" that God had cured his schizophrenia. 15 RR 9.[5] He refused to take any more antipsychotic

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[5] Mr. Panetti described this religious experience in his opening statement to the jury at the guilt-innocence phase of his capital murder trial:

> In my year in the Waco Branch Davidian expert's cell in Bell County, I didn't hear from my previous law firm, and I got paranoid that I wasn't being told or lost a chance to appeal the decision of the illegal evidence that was found illegal and then found legal, and I came to the conclusion after my medicine was taken from me and I went into the paranoia and the thought disorder that it depended on me, the April fool, as I consider myself the born again April fool, not saying being

(Continued on following page)

medication. He asked the trial court that he be allowed to represent himself. 15 RR 14-16, 26. His attorneys objected, 15 RR 12-13, as did the District Attorney. 15 RR 23-24. The trial court ruled that Mr. Panetti could represent himself. 15 RR 29-30.

Wearing a cowboy outfit,[9] Mr. Panetti raised a defense of not guilty by reason of insanity. He told the jury in his opening statement that only an insane person could prove insanity. 31 RR 29. Mr. Panetti made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries; exhibited sudden flights of ideas; asked questions that were incomprehensible or burdened with excessive and extraneous detail; rambled incessantly; perseverated; recited senseless, fragmented aphorisms and anecdotes; badgered the judge, the prosecuting attorney, and witnesses; and was unable to control his behavior despite the judge's repeated efforts.

Mr. Panetti applied for over 200 subpoenas, including John F. Kennedy, the Pope, and Jesus. *See* 36 RR 1207 ("I didn't want to go subpoena crazy and I turned the Pope loose and J.F.K. and I never subpoenaed them, but Jesus

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born again bars someone from being able to sin, but I depended on the Lord to do for me what the medicine wasn't doing.

31 RR 31-32; *see* JA 339, 345 (Petitioner's Ex. 2, 1 FH 159, 159).

[9] His standby counsel described Mr. Panetti's appearance:

> Scott dressed in a "Tom Mix" style costume like an old TV western. Scott wore his hat in Court. He had pants that looked like leather suede tucked into his cowboy boots. He wore a cowboy style shirt with a bandana. The shirt was the double fold over type western shirt. One shirt was green, the other was burgundy. Scott wore a big cowboy hat that hung on a string over his back. It was a joke. It was like out of a dime store novel.

JA 23-24.

Christ, he doesn't need a subpoena. He's right here with me, and we'll get into that."). He made unintelligible comments to the panel of prospective jurors during general voir dire:

> The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister. Adjustment, Jesus wrote. I was born in the North woods in a reservation hospital and my granddad was a justice of the peace and he sobered up the doctor and the doctor was half sobered and they delivered me and my mom had a bad sickness in her milk and they wondered why I wasn't dead, and a lot of beatings I took from the kids that show me had prejudice, which I don't have any prejudice, and they said this about me in the newspapers in the beginning, but I don't love Injuns and Mexicano, and Mexicano know, but I suffered a lot of reverse prejudice from Colored people, which is rare, darn rare, but I was named "He who doesn't cry" because I didn't cry when I should have, and I must admit, though, in Gillespie County Jail when I was in my little suicide box where there was an old boy committed suicide, I went through about a week of pretty much scuba diver's tears; although, I don't scuba.

21 RR 87-88. He became fixated on irrelevant issues when examining witnesses:

> The Court: Mr. Panetti, at this time I don't see how the belt buckle is relevant to any issue this jury is going to determine and so if you can't explain the relevance to me, I'm going to sustain the objection. Can you explain to me how the belt buckle is relevant to any issue in this case?

Mr. Panetti: Yes, I can, Your Honor. It has to do with jailhouse religion. It has to do what some men would do for a belt buckle. It has to do with the difference between a rodeo hand and a buckaroo poet. It has to do with my whole outlook and this will come up, God forbid, in the punishment stage.

Before religion, when you got religion, prior religion, church member, I'm going to have witnesses from the church come in and Chaplain Bob got on his knees and read that buckle, Ranger Cummings, read this buckle and people go out of their way. At rodeos cowboys make sure they look at your buckle without you looking at it.

33 RR 755-56. He prefaced incoherent questions with rambling statements:

Mr. Panetti: Canteen where – I was expecting the whole list to question, Donna Stanley, educated, expert.

The Court: You need to ask a question, Mr. Panetti.

Mr. Panetti: I hope you don't find any more – well, Dr. Bayardo, he didn't find any offense when I mentioned "Quincy." We didn't say whether we liked the show, but we mentioned about the beginning where the cops got sick, and I asked him that naturally for a reason, but I didn't ask him if it made the job popular or anything, but when it

> comes to dealing with blood, his autopsy, and the crime scene, your expert evidence, autopsy, crime scene. I'm thinking out loud, so I don't ask you questions that you're – well, it would be like asking a rodeo hand what cutting a horse means. They might know it all, but I just – have you got those pictures of the glow-in-the-dark?

32 RR 443. He assumed the personality of "Sarge" when he testified about the crime:

> Joe, Joe, Amanda, no talking, no words, knife, Sarge knife, threatened, scared, fight, no. Sarge shoots, CC. Sarge turns, shoots, boom, boom. Where is Amanda? Mom is dead. Joe look up. No. Where's Birdie? Sonja bedroom. Birdie. Joe. Where's Amanda? Sarge, Sarge, left a bullet. Scott, what? Scott, what did you see Sarge do?
>
> Fall. Sonja, Joe, Amanda, kitchen. Joe bayonet, not attacking. Sarge not afraid, not threatened. Sarge not angry, not mad. Sarge, boom, boom. Sarge, boom, boom, boom, boom. Sarge, boom, boom.
>
> Sarge is gone. No more Sarge. Sonja and Birdie. Birdie and Sonja. Joe, Amanda lying kitchen, here, there, blood. No, leave. Scott, remember exactly what Sarge did. Shot the lock. Walked in the kitchen. Sonja, where's Birdie? Sonja here. Joe, bayonet, door, Amanda. Boom, boom, blood, blood.
>
> Demons. Ha, ha, ha, ha, oh, Lord, oh, you.
>
> The Court: Mr. Panetti, let's stop.

37 RR 1544-46. He delivered an incoherent guilt-innocence phase closing argument:

> Ladies and gentlemen of the jury, I think that State will have more than a few comments, judging by the time allowed to respond to mine.

> Briefly, in 45 minutes you might wonder a little bit about when I testified, and Scott and Sarge and who talked and who talked about who and who talked about what and in light of Dr. Simes not being here, he did leave this letter and it will explain that and it has something to do about me showing you the tattoo and introduce you to Will, and I don't tell you Texas Will and Chaplain or Montana Will and go into that, and the evidence will, if you read that, look over that, might explain that. I wish you not to mistake charisma for sanity. Charisma is by definition a spiritual gift.
>
> Briefly touching on just a few of the – demon dabbling is my understanding just a nonphysical being hostile to humans and God, caused by bad influences and disease, mental distress on human beings.

38 RR 1645-46.

On September 21, 1995, the jury found Mr. Panetti guilty of capital murder. The next day, the punishment phase began. The prosecution called two witnesses, including Dr. James Grigson, who testified that antipsychotic medications would not reduce the likelihood that Mr. Panetti would be a future danger to society. 39 RR 54, 60. Mr. Panetti called only one witness, his standby counsel. He was sentenced to death the same day. 7 CR 1033-38.[10]

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[10] Less than two months after Mr. Panetti was sentenced to death, the trial court found him incompetent to waive the appointment of state habeas counsel under Article 11.071 of the Texas Code of Criminal Procedure. 43 RR 6-9. Soon thereafter, Mr. Panetti wrote to the trial court that he wished to waive his right to direct appeal. Federal Petition at Ex. 32. The judge denied his request and appointed an attorney to represent him on direct appeal.

Dr. Wolfgang Selck, a psychiatrist who treated Mr. Panetti during one of his hospitalizations years before the crime, watched part of the trial. Dr. Selck described Mr. Panetti's behavior in the courtroom:

> I saw Scott's rambling and antics as a sign of his clear incompetence. I suspect that the members of the Jury as lay persons saw Scott and thought he was normal and pretending to be mentally ill. In my opinion it [is] not possible to imitate the words and deeds of a mentally ill person. To an expert, there are too many details of voice and action that indicate the signs of mental illness: the inappropriate behavior, the repetition of words, the fixation on details, the bizarre presentation. He should be institutionalized in a State Hospital for the criminally insane. In my opinion, Scott is not a malingerer. Scott was not faking a mental illness. Scott was severely mentally ill and has not changed and most likely shall not improve to an appreciable degree. When I was treating Scott in 1986 he was not facing any charges and had no reason to act mentally ill.

JA 34-35.

**2. Deterioration**

It is undisputed that Mr. Panetti's mental health markedly deteriorates when he is not taking antipsychotic medication. At the time Mr. Panetti was found competent to stand trial, he was on antipsychotic medication to alleviate some of the symptoms of his schizophrenia. 13 RR 69-70. However, after his 1995 April Fool's Day religious experience, he stopped taking his medication. By the time the trial began, he had been in an unmedicated state for five months. Except for a brief period shortly after arriving on death row, Mr. Panetti has not taken any

antipsychotic medication since the day he declared that God had cured him of his schizophrenia. *See* JA 196; JA II 26, 32-33.

The evidence at the competency-to-stand-trial proceedings showed that Mr. Panetti's schizophrenic symptoms (delusions, hallucinations, tangentiality, and circumstantial thinking) markedly diminished when he was taking his medication. 13 RR 67-70; *see* 13 RR 74 (testimony of Dr. Coons stating that medication and hospitalization have had a "positive influence" on Mr. Panetti); 13 RR 80 (testifying that Mr. Panetti "gets better" when he is treated). Mr. Panetti was then being treated with such a heavy dosage of Trilafon that it would render somebody without a severe mental illness dysfunctional. 13 RR 69, 71. Without any medication, Dr. Coons testified, Mr. Panetti would be "very psychotic," "tremendously paranoid," and "more delusional." 13 RR 71. Dr. Simes agreed that Mr. Panetti's condition would worsen if he were not taking any antipsychotic medication. 9 RR 279.[11]

At the federal hearing, the evidence confirmed that Mr. Panetti's mental condition has deteriorated since he was found competent to stand trial. Dr. Conroy attributed the deterioration to the fact that Mr. Panetti has not been on any kind of psychotropic medication since April 1, 1995. JA 195. She testified that "[i]t is likely with Mr. Panetti that his condition would be worse the farther he is from the medication." JA 195. Dr. Silverman testified that Mr.

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[11] After reviewing the trial record and examining Mr. Panetti for state habeas counsel, psychiatrist Michael R. Arambula concluded: "As a result of his unmedicated state, Mr. Panetti's disease process deteriorates to such a level that he was subject to persecutory delusions, and severe disturbances in his thinking (and ability to communicate with others)." JA 353.

Panetti was "more lucid, coherent, and logical when he took his medication." JA 228. He suspected that since Mr. Panetti stopped taking his medication, "his illness has progressed more significantly." JA 228. Noting the type and amount of psychotropic medication that Mr. Panetti was taking on a daily basis prior to the 1994 competency proceedings, Dr. Silverman explained that:

> I can't imagine anybody getting that dose waking up for two to three days . . . . And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

JA 233.[12] Dr. Silverman concluded that the lack of medication in a case like Mr. Panetti's would most likely lead to "a more severe refractory kind of illness." JA 236.

### 3. Present Competency

Shortly before Mr. Panetti was scheduled to be executed on February 5, 2004, habeas counsel visited him on death row to gather evidence of his present competence. Counsel reported that Mr. Panetti believed that his imminent execution was part of a satanic conspiracy to prevent him from preaching the Gospel. JA 102. Clutching a well-worn

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[12] Dr. F.E. Seale, who treated Mr. Panetti at Starlite Hospital in 1986, testified at trial that he prescribed "huge doses of Thorazine to bring [Mr. Panetti] under control, up to 2400 milligrams a day. We finally settled on about 2,000 milligrams of Thorazine a day, when 100 milligrams would knock the average person out, but it took that to control [Mr. Panetti]." 38 RR 1568-69. Dr. Seale also testified that, without antipsychotic medication for several days, Mr. Panetti could lapse into a severe psychosis. 38 RR 1574-75.

and meticulously tabulated Bible, Mr. Panetti described in rambling and disjointed fashion how the Holy Spirit had freed him from his handcuffs after prison guards had placed him in a room filled with inmates who began beating him. JA 102-03.

Having represented Mr. Panetti for several years, counsel was familiar with his lengthy mental health history, his delusions of persecution, and his excessive religiosity. Nearly two decades earlier – years before the crime – Mr. Panetti first succumbed to the delusion that he was engaged in an apocalyptic struggle with the devil.[13] With this history in mind, counsel arranged for Mark Cunningham, a clinical and forensic psychologist, and David Dow, a law professor who represents condemned inmates in post-conviction proceedings, to visit Mr. Panetti. Dr. Cunningham reported that Mr. Panetti exhibited disorganized thinking, characterized by flight of ideas,

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[13] In 1986, Mr. Panetti's first wife provided an affidavit in support of her request to have Mr. Panetti transferred from Kerrville State Hospital and involuntarily committed to the Waco V.A. Hospital:

> My husband . . . has over the last two months been experiencing hallucinations and has been generally out of touch with reality. He became very paranoid and was always thinking that someone was watching him from the creek in our backyard. He would sit on the porch all day to keep watch. The paranoia has continued to the present. After our baby was born in March, he became obsessed with the idea that the devil was in our house. He finally had a ceremony to get rid of the devil during what he called the "devil's birthday." He buried many valuables next to the house and stacked other furnishings and valuables above the ground which he washed with water. He would stay up during the night and "make magic with the lights." He claims that he saw the devil on a wall and cut the devil with a knife and that blood had run out on him.

JA 38-39.

tangentiality, and circumstantiality. JA 108-09 (Petitioner's Ex. 7, 2 FH 53, 53). He found that Mr. Panetti was actively psychotic, had delusional beliefs that were both grandiose and paranoid, and was suffering from schizophrenia or schizoaffective disorder. JA 109. Dr. Cunningham said that Mr. Panetti believed that he is the target of evil forces that "included not only Wicken [sic] national headquarters in Wisconsin, but also reached even into 'the administration.'" JA 109. He attributed his impending execution to these demonic forces that wish to stop him from continuing to preach the Gospel. JA 109. Mr. Panetti also described himself as a "born again April fool," miraculously healed by God and, therefore, no longer in need of medication or treatment. JA 109. Dr. Cunningham concluded that Mr. Panetti was not malingering his symptoms, because it is nearly impossible to imitate the disorganized thinking he exhibited and because he has a history of "psychotic decompensation and inpatient psychiatric treatment." JA 110.

Professor Dow stated that Mr. Panetti was unable to answer questions in a linear fashion, bounced wildly from topic to topic, freely associated, and peppered his remarks with random and irrelevant biblical quotations. JA 111 (Petitioner's Ex. 10, 2 FH 73, 74). He described Mr. Panetti's delusion that prison officials and inmates had thrown boiling water on him, but Jesus had cooled the water before it touched his skin. JA 111. Mr. Panetti also said that he had not shed any blood when inmates had shot him with blowgun darts. JA 111. Half a dozen times during Professor Dow's interview, Mr. Panetti had explained that his imminent execution was being orchestrated by evil, "anti-Christian forces" that wanted to "rub him out" to keep him from preaching the Gospels of Jesus Christ. JA 111.

Based on this evidence, the state court appointed two mental health experts. JA 59-60. These experts, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, conducted a joint evaluation of Mr. Panetti and co-authored a report. JA 70-76. They described Mr. Panetti as controlling and uncooperative, ignoring their repeated questions and, instead, "filibustering about the Bible and the Lord." JA 70. Mr. Panetti did, however, unambiguously state that he is on death row, because "[t]hey don't want me to preach the Word of God." JA 72. Deciding that further questioning was futile, the experts ended the clinical interview after an hour. JA 73. Dr. Anderson and Dr. Parker believed that "Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics." JA 75. They concluded that Mr. Panetti knows that he is to be executed, and that, "[a]lthough Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed." JA 75. The state court agreed and found that Mr. Panetti "has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." JA 99-100.

At the federal evidentiary hearing, counsel for Mr. Panetti presented the testimony of four mental health experts. The State presented the testimony of three death row correctional officers and the two mental health experts who had been appointed by the state court.

Mary Alice Conroy, a forensic psychologist, testified that Mr. Panetti has "a severe thought disorder," meaning that "his thinking does not fit together in any kind of logical, rational way." JA 139. She believed he suffers from schizoaffective disorder. JA 144. His symptoms include

pressured speech, flight of ideas, loose associations, and inappropriate affect. JA 146. Dr. Conroy testified that Mr. Panetti knows he is on death row and that the State intends to execute him. JA 147. However, Mr. Panetti told her that:

> His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness, and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the State wants to kill him is not what they're saying.
>
> He says granted he understands that the state is saying that they wish to execute him for this murder, he knows that, but that's really a sham, that that's not why the state wants to execute him. The state wants to execute him to stop him from preaching.

JA 149; *see* JA 150, 155 (explaining delusion that his execution is part of "spiritual warfare"). She testified that Mr. Panetti believes these evil forces first manifested themselves in the mid-1980's, when demons possessed his home, his furniture, and his possessions. JA 149-50; *see* n.13, *supra*.[14] Dr. Conroy concluded that Mr. Panetti does

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[14] Mr. Panetti was involuntarily committed for psychiatric problems over a dozen times in hospitals in Texas and Wisconsin in the decade preceding the crime. Treatment professionals repeatedly found him to be paranoid, grandiose, delusional, and hallucinating. He exhibited tangential and circumstantial thinking, severely impaired judgment, and excessive religiosity. These profound disturbances in his thinking and perception consistently led to diagnoses of chronic undifferentiated schizophrenia and schizoaffective disorder. The doctors frequently prescribed antipsychotic medication to alleviate some of his psychotic symptoms. Auditory and visual hallucinations exacerbated

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not appreciate the connection between his killing of his wife's parents and his execution. JA 150. Because of the difficulty of imitating the symptoms of a severe thought disorder – jumping from topic to topic, thinking illogically, and making loose associations – Dr. Conroy found that Mr. Panetti was not malingering. JA 150-51, 153-54. Adding support to her conclusion, she noted that Mr. Panetti's lengthy mental health history showed that his delusions about demonic persecution had remained remarkably consistent. JA 182-83.

Susana A. Rosin, a psychologist, testified about Mr. Panetti's inability to maintain a train of thought, his flight of ideas, and his use of excessive, irrelevant detail. JA 200-02. She said that his symptoms are consistent with someone suffering from schizophrenia. JA 205. She also noted that he displayed some signs of schizoaffective disorder, which she described as a thought disorder accompanied by rages, manic episodes, and sleeplessness. JA 206. Dr. Rosin testified that Mr. Panetti has a set of fixed delusions

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his delusions of persecution and grandiosity. He believed that the devil had possessed his furniture. He buried it in the backyard and sprayed it with water to exorcize the devil. He claimed to have seen the devil on the walls of his home and admitted to hearing the voice of the devil. He believed he was being controlled by an unseen power. He believed the neighbors were spying on him, so he nailed his curtains shut. Two years before the crime, Mr. Panetti was involuntarily committed for homicidal behavior after he began swinging a sword around the house and threatening to kill his wife, baby, father-in-law, and himself. He thought the citizens of Fredericksburg were plotting against him. In July 1991, he was hospitalized and found to be suffering from delusions of grandiosity and psychotic religiosity. The possible presence of three alternative personalities was noted. *See generally* JA 339-41 (summarizing psychiatric history). Each of the experts who testified at the federal hearing reviewed Mr. Panetti's mental health records predating the crime. JA 141; JA 211-12; JA 222; JA 240; JA 307; 2 FH 56-57.

that date back to the 1980's, centered around grandiose ideas that he must save others by preaching the word of God. JA 203. She explained that Mr. Panetti could hold a normal conversation if the discussion did not deal with his fixed delusional system. JA 203-04. She believed that he knows he is on death row and that he is going to be executed. JA 207. Dr. Rosin also testified that Mr. Panetti knows he killed his parents-in-law. JA 208. However, he told her that he does not believe these murders are the real reason the State seeks his execution. Instead, he believes that he was put on death row to preach the Gospel to save other inmates, and that "the forces of evil, demons, devils" have been in a conspiracy for years to kill him and put an end to his preaching. JA 202, 209. She concluded that Mr. Panetti was not malingering. JA 202, 205, 213.

Seth Silverman, a forensic psychiatrist, diagnosed Mr. Panetti with schizophrenia. JA 227, 233. He testified that Mr. Panetti believes an individual named "Sarge" killed his wife's parents. JA 221, 235. Dr. Silverman said that Mr. Panetti knows the State wants to execute him, but that these murders are not the reason. JA 221. Mr. Panetti persisted in his belief that the real reason is "[b]ecause he preaches the word of the gospel." JA 222. He does not associate his killing of his parents-in-law with his execution, or have a rational understanding of why the State wants to execute him. JA 221-22, 231. Dr. Silverman concluded that Mr. Panetti was not feigning symptoms of severe mental illness, because no one could fabricate the intensity, the grandiosity, and the tangentiality of thinking that Mr. Panetti has consistently exhibited. JA 222-24.

As its first witness, the State called Dr. George Parker, the psychologist whom the state court had appointed to evaluate Mr. Panetti. According to Dr. Parker,

Mr. Panetti refused to cooperate with the evaluation, because Dr. Parker and Dr. Mary Anderson would not answer his question about their religious preferences. JA 238. Dr. Parker did not dispute that Mr. Panetti suffers from "significant psychological problems." JA 239. He testified that Mr. Panetti said he was going to be executed to keep him from preaching the word of God. JA 255, 272. However, Dr. Parker testified that Mr. Panetti is not incapable of understanding why the authorities have ordered his execution even though he is preoccupied with religion and may, on some level, genuinely believe that he is being executed for preaching the Gospel. JA 247. Dr. Parker admitted that he does not know whether Mr. Panetti understands why he is going to be executed, but he insisted that Mr. Panetti is "capable of understanding." JA 247.

The State also called Mary Anderson, the forensic psychiatrist who had examined Mr. Panetti in the state execution competency proceedings. She explained that Mr. Panetti would not answer her and Dr. Parker's questions, because they refused to respond to his question whether they believed in Jesus. JA 299-301. Mr. Panetti told Dr. Anderson that "the devil is trying to rub me out for preaching the word of Jesus Christ." JA 309; *see* JA 303, 319. However, Dr. Anderson believed that Mr. Panetti had the mental capacity to understand the real reason he is going to be executed. JA 304, 315. She said that Mr. Panetti's refusal to cooperate with the evaluation was the result of deliberate, conscious choice rather than the product of mental illness. JA 312-13. She refused to conclude that Mr. Panetti suffers from schizophrenia,

because she did not think that his mental illness was relevant to the competency determination. JA 313-14.[15]

In rebuttal, counsel for Mr. Panetti called Dr. Cunningham, the same expert who had visited Mr. Panetti days before his scheduled execution. After conducting a more thorough evaluation, Dr. Cunningham testified that the conclusions of Dr. Parker and Dr. Anderson that Mr. Panetti was deliberately uncooperative were not a fair characterization of his behavior. JA 324. Dr. Cunningham explained that Mr. Panetti has a lengthy history of responding to questions with religiosity rather than concrete answers. JA 324-26.[16] Emphasizing that Mr. Panetti

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[15] The State also called three correctional officers at the hearing. Steven Miller testified that Mr. Panetti knows that he is going to be executed. JA 296. However, Miller did not have any idea whether Mr. Panetti knows why he is going to be executed. JA 296. Terri Hill testified that Mr. Panetti appeared to be aware of his situation, but that she had never had a lengthy conversation with him. 1 FH 196-97. She described an incident where Mr. Panetti was jogging "frantically" around the recreation room, preaching to the other inmates from a Bible he carried. 1 FH 195. The inmates shouted profanities and yelled at him to stop, but Mr. Panetti was undeterred. 1 FH 195. Victoria Williams testified that Mr. Panetti is different from others because he "over-preaches" to the inmates and correctional officers. 1 FH 201. She said that he realizes his preaching angers the other inmates but that he keeps doing it anyway. 1 FH 204.

[16] Mr. Panetti behaved in a similar manner when his post-conviction counsel attempted to discuss the issues with him in preparation for filing the federal habeas petition:

> When I attempted to mention a topic, he was unable to continue the same line of thought in his conversation, instead going off on some bizarre tangent. He would talk about the Death Row guards and the "belly of the whale" or his spiritual healing and role as God's son. . . . Mr. Panetti was often making esoteric references to the Bible and would hold up his copy to show us some important significance that only he saw. To answer a question from counsel, he would open his Bible to read a verse that signified to him the answer.

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behaved in a manner consistent with someone suffering from schizophrenia, Dr. Cunningham explained:

> [W]hy we call schizophrenia thought disorder is the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and comes out in a tangential, circumstantial, symbolic sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.
>
> And so, when I encounter somebody like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic . . . .

JA 328. According to Dr. Cunningham, Mr. Panetti believes the State of Texas is not acting as a lawfully constituted authority in seeking his execution. JA 333. Instead, Mr. Panetti thinks that the State "is in league with the forces of evil to prevent him from preaching the gospel." JA 333. Dr. Cunningham identified this as a "specific delusional belief," consistent with Mr. Panetti's "long-standing delusions of religiosity" and diagnoses of schizophrenia and schizoaffective disorder documented in the records

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> Among his many bizarre statements, Mr. Panetti said that he alone was a "closet commando Guru" and that "he who is first is last."

JA 43; *see* JA II 1 (Death Row medical records noting that: "The patient reports: he is a preacher and is to deliver the Word of God to those around him. . . . Pt was hyperreligious. . . . Pt would only speak of the Bible and God.").

from his numerous psychiatric hospitalizations since the 1980's. JA 334.[17]

## SUMMARY OF THE ARGUMENT

Scott Louis Panetti is a captive to a malfunctioning brain that cannot tell the difference between what is real and what is imagined. Nearly all of the experts and treating professionals who have examined him over the last two decades have consistently diagnosed him as suffering from schizophrenia or schizoaffective disorder. Profound distortions in thinking and perception characterize these mental illnesses.[18] The hallmark of Mr. Panetti's condition is his psychotic delusion of religious persecution. Mr. Panetti believes that demonic forces, in league with the State of Texas, have orchestrated his execution in a final effort to prevent him from preaching the Gospels of Jesus Christ. According to Mr. Panetti, the State of Texas is using the murder of his wife's parents as a pretext to

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[17] The District Court found it significant that "no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed." JA 364.

[18] Schizophrenia is one of the most chronic and disabling of the severe mental illnesses, because its core symptoms include "distortions in thought content (delusions), perception (hallucinations), language and thought process (disorganized speech), and self-monitoring of behavior (grossly disorganized or catatonic behavior)." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 299 (4th ed. text revision 2000). "The essential feature of Schizoaffective Disorder is an uninterrupted period of illness during which, at some time, there is a Major Depressive, Manic, or Mixed Episode concurrent with [the characteristic symptoms] for Schizophrenia." *Id.* at 319. Schizophrenia and schizoaffective disorder affect less than one percent of the population. R.W. Buchanan & William T. Carpenter, *Concept of Schizophrenia*, in *Comprehensive Textbook of Psychiatry* 1330 (B. Sadock & V. Sadock eds., 8th ed. 2005).

fulfill the devil's plot to silence him. In short, Mr. Panetti is in the grip of a delusion that puts his execution at the center of his irrational beliefs.

Mr. Panetti's execution can proceed, the Fifth Circuit held, because the Eighth Amendment does not require that a prisoner must "rationally understand" the reason for his punishment, only that he must be "aware" of the reason the State has given. JA 381. This functionless distinction is incompatible with the Eighth Amendment and *Ford v. Wainwright*. Analysis of the relevant indicators of the Amendment's meaning demonstrates that it does not permit the execution of a person who is so lacking in rational understanding that he cannot comprehend that he is being put to death because of the crime he was convicted of committing.

First, the reasons for the firmly-embedded common-law rule against executing the insane include the recognition that killing a person who is unable to understand that the execution is a punishment for his crimes (1) serves no retributive purpose, and (2) denies the condemned an opportunity to prepare properly for death. The *Ford* majority opinion and Justice Powell's concurrence agree that these rationales retain contemporary cogency. In requiring an inmate to have a rational understanding of the reason for his execution, Justice Powell crafted a standard that implements the enduring purposes of the common-law ban.

Second, among the States that have defined a standard of competency for execution, there is a broad contemporary consensus against executing condemned inmates who are too mentally ill to understand the connection between the crime and its punishment. This consensus confirms that the capacity for such an understanding

continues to this day to be recognized as a necessary component of the competency standard.

Third, putting to death a person who has no rational understanding of the reason for his execution does not measurably contribute to the retributive or deterrent functions of capital punishment and is, therefore, mere wanton cruelty for Eighth Amendment purposes. Moreover, executing a person who cannot understand that his impending death is the result of the crimes for which he stands convicted adds a further dimension to this cruelty, because it deprives the person of any opportunity to expiate the offense by making amends with his conscience or his God.

Each one of these indicators – recognized by the Court's precedents as keys to Eighth Amendment interpretation – points in the same direction. To execute someone like Scott Panetti – a man who, in Justice Powell's *Ford* formulation, cannot "perceive[] the connection between his crime and his punishment," 477 U.S. at 422 – offends a standard of decency with established common-law roots, pervasive contemporary acceptance, and a particular fitness to accommodate the recognized aims of capital punishment with those of Cruel and Unusual Punishment doctrine.

## ARGUMENT

### THE EIGHTH AMENDMENT PROHIBITS THE EXECUTION OF A PERSON WHO, BECAUSE OF A SEVERE MENTAL IMPAIRMENT, IS INCAPABLE OF RATIONALLY UNDERSTANDING THE REASON FOR HIS EXECUTION.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), counsel for the petitioner argued that the right not to be executed

while insane was a substantive federal constitutional right, guaranteed by the Eighth Amendment, as incorporated into the Fourteenth Amendment. Alternatively, counsel argued that, even if the right were merely a creature of Florida law, the Due Process Clause required Florida to administer it through fair procedures. A majority of the Court made a clear choice to rest its decision upon the first of these two grounds, holding that the Eighth Amendment "places a substantive restriction on the State's power to take the life of an insane prisoner." *Id.* at 405. It follows that, while the States may have some leeway in crafting the specific terms of their local test for competency to be executed, the Eighth Amendment imposes a constitutional minimum standard that all these tests must meet. "With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967); *accord Ford*, 477 U.S. at 419 (Powell, J., concurring) ("The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental state. The bounds of that category are necessarily governed by federal constitutional law."). This case requires the Court to determine whether that minimum Eighth Amendment standard includes the mental capacity to understand that one is being executed as a punishment for a crime.

Texas proposes to execute Petitioner Scott Louis Panetti, despite overwhelming evidence that his schizophrenia has left him shackled to a psychotic delusion strong enough to thwart the power of logic and reason. Mr. Panetti believes that he and the devil have been engaged in an apocalyptic struggle – "spiritual warfare" – for years,

and that the devil has specifically targeted him because of his profound Christian faith and relentless efforts to persuade others to follow the teachings of Jesus Christ. He thinks that the actual reason for his execution is the devil's persecution for spreading the Gospels, not the State's retribution for killing his wife's parents. He views his capital murder conviction as simply part of the State's grand design to cover up the diabolical conspiracy that will make him a martyr. Mr. Panetti's distorted perception of reality falls substantially short of the constitutional minimum, which requires at least that the inmate "perceives the connection between his crime and his punishment." *Ford*, 477 U.S. at 422 (Powell, J., concurring).

"The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Recognizing that Eighth Amendment analysis "should be informed by 'objective factors to the maximum possible extent,'" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring) (internal quotation marks omitted), this Court has looked to the "ancestral legacy" of the common law, *Ford*, 477 U.S. at 408; a discernible contemporary consensus of "legislative enactments and state practice," *Simmons*, 543 U.S. at 563, particularly when that is reflective of "a much broader social and professional consensus," *Atkins*, 536 U.S. at 316 n.21; and the conformity or disjuncture between the particular infliction of capital punishment and generally understood "penological justifications for the death penalty." *Simmons*, 543 U.S. at 571. With regard to the narrow question presented in Mr. Panetti's case – whether

the Eighth Amendment permits the execution of a person who is incapable of understanding that his death will be the punishment for a crime he has committed – all of these objective indicators point to the same, negative answer.

## I. THE ANCESTRAL LEGACY OF THE COMMON LAW INSISTS THAT THE DEATH PENALTY CANNOT BE IMPOSED ON A PERSON SO LACKING IN RATIONAL UNDERSTANDING THAT HE IS UNABLE TO PERCEIVE THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT.

### A. *Ford* identified the common-law justifications for the ban on executing the insane that retain contemporary validity.

In holding that the Eighth Amendment prohibits the execution of the insane, *Ford* found that this ancient proscription was unquestioned and firmly embedded in the common law at the time the Bill of Rights was adopted. 477 U.S. at 406-08. The common law had settled on no single reason for the ban, and because some of its rationales might have become obsolete,[19] the prevailing *Ford* opinions undertook to identify those common-law purposes that still retain vitality today.

Both the majority and Justice Powell cited Blackstone for asserting that the rule reflected not only "'the humanity of the English law'" in appreciating that an insane prisoner might be unable to allege "'something in stay of judgment or execution,'" 477 U.S. at 407 (quoting William

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[19] *See* Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 383 (1962).

Blackstone, 4 *Commentaries* *24-*25),[20] but also a recognition that "execution serves no purpose in these cases because madness is its own punishment." *Id.* at 407-08. Coke viewed the execution of the insane as but "'a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.'" *Id.* at 407 (quoting Sir Edward Coke, 3 *Institutes* 6 (6th ed. 1680)). His explanation suggests that execution of the insane "contributes nothing to . . . deterrence" and "simply offends humanity." *Id.* Still another rationale had religious roots: Executing a person who is unable to reflect on his conduct and predicament deprives him of a last opportunity to make peace with God. *Id.* A final rationale rested on the assertion that the execution of the insane does not satisfy "the community's quest for retribution." *Id.* at 408 (internal quotation marks omitted).

The majority opinion specifically concluded that at least three of these common-law rationales continue to "have no less logical, moral, and practical force than they did when first voiced." *Id.* at 409. First, the Court noted that "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.* The Court characterized executions lacking retributive purpose as nothing more than "mindless vengeance." *Id.* at 410. Second, the Court believed that modern society abhorred the practice of executing "one who has no capacity to come to grips with his own conscience or deity." *Id.* at 409. Consequently, Eighth

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[20] Justice Powell found that the rationale of protecting an inmate's ability to articulate legal grounds in bar of execution had "slight merit today." *Id.* at 421; *see id.* at 422 n.3.

Amendment prohibition of the practice would "protect the condemned from fear and pain without comfort of understanding." *Id.* at 410. Third, the Court concluded that, no less than in ancient times, execution of the insane "simply offends humanity." *Id.* at 409.

Justice Powell joined this portion of the majority opinion, but wrote separately to offer additional analysis that could guide specific application of the majority's Eighth Amendment holding. In defining "the meaning of insanity" in the execution setting, *id.* at 418, he looked to the common law and the modern practices of the States – the same sources that informed the majority's recognition of a substantive right against execution of the incompetent – to formulate a "precise definition" of incompetency. *Id.* at 419. Because the various rationales supporting the ancient ban on executing the insane "do not provide a common answer when it comes to defining the mental awareness required by the Eighth Amendment," *id.*, Justice Powell focused on the two that he believed still had merit in modern practice. First, because most people today "value the opportunity to prepare, mentally and spiritually for their death," he determined that the general concern of the common law – "that executions of the insane are simply cruel" – remained valid. *Id.* at 421. Second, he found that one of the "critical justifications" for the modern use of capital punishment – its retributive force – coincided with the common-law rationale that required "the defendant's awareness of the penalty's existence and purpose." *Id.* He concluded that a constitutionally appropriate standard for competency to be executed had to satisfy both of these rationales:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only

> if the defendant is aware that his death is approaching can he prepare for his passing.

*Id.* at 422. Accordingly, he proposed a standard that would prohibit the execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.*[21]

This review of the majority opinion and Justice Powell's concurring opinion in *Ford* leads to three unremarkable conclusions. First, the competency standard that Justice Powell endorsed must be read in light of the common-law rationales that he found had modern-day merit: (1) that the retributive goal of capital punishment is not furthered by executing someone so lacking in understanding that he cannot grasp "the connection between his crime and his punishment," and (2) that it is uniquely cruel to execute a person who has no chance to obtain mental or spiritual consolation in preparation for his death, because he does not comprehend the reason he is to die. Second, Justice Powell's standard is consistent with the majority's stated reasons for finding that the Eighth Amendment embodies the common-law prohibition: that "executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" has no retributive value, and that it offends humanity to execute someone who lacks the "comfort of understanding" his impending fate, because he does not have the "capacity to come to grips with his own conscience or deity." *Id.* at 409. Third, for these underlying common-law rationales to be satisfied, an inmate must

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[21] Justice Powell's use of the term "suffer" is instructive. It provides additional support for the conclusion that his proposed test incorporates the common-law retributive rationale.

possess a rational understanding of his predicament, including a capacity to perceive the punitive connection between his criminal conviction and his impending execution.[22] The inmate must be capable of realizing his moral guilt before he can prepare himself for death as expiation for his offense, and the state's punitive purpose must be intelligible to him for retribution to be meaningful.

### B. The common-law rationales embraced by the *Ford* opinions logically imply the need for rational understanding.

In *Ford*, both the majority and Justice Powell referred to Hawles's commentaries, which emphasize that:

> [T]here being so many to be made examples of, besides those on whom the misfortunes of madness fall, it is inconsistent with humanity to make examples of them; it is inconsistent with religion, as being against christian charity to send a great offender quick . . . into another world, when he is not of a capacity to fit himself for it.

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[22] Justice Powell's opinion contains five slightly different formulations of the competency standard he approved. These formulations prohibit the execution of persons (1) who "are unaware of the punishment they are about to suffer and why they are to suffer it;" (2) "who d[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed on them;" (3) who are "unable to understand the nature and purpose of such sentence;" (4) who are unable "to understand the nature of the sentencing proceedings, i.e., why he was being punished and the nature of his punishment;" and (5) who do not "know the fact of their impending execution and the reason for it." *Id.* at 421-22, 422 n.3 (citations and internal quotation marks omitted). A rational understanding of the connection between one's criminal conviction and execution is explicit or implicit in each formulation.

Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, in *XI State Trials* 477 (T. Howell ed., 1816). Hawles is the most explicit of the common-law writers regarding the specific capacity demanded for competency to be executed, and courts in the common-law tradition continue to echo his point. *See State v. Noel*, 133 A. 274, 283 (N.J. 1926) ("The law is zealous in permitting one condemned to death to make his peace with the Almighty, before he pays the penalty of his crime. This expiation cannot be made by one who is insane."); *Musselwhite v. State*, 60 So. 2d 807, 811 (Miss. 1952) ("It is . . . part of due process that there be available to [the condemned] as a rational person avenues toward . . . spiritual consolation."). Plainly, the capacity to understand why one is to die – the capacity to connect one's death with one's life and deeds and to come to terms with one's responsibilities in the end – is a necessary condition for fitting oneself for execution in the common-law sense.

Equally plainly, to inflict death upon one who does not understand its punitive purpose would substitute "mindless vengeance," *Ford*, 477 U.S. at 410, for the concept of just deserts that is central to the retributive justification for capital punishment. This is why common-law courts have insisted that, "before the prisoner could be found insane, it should be shown that he would not know he would deserve punishment for doing a wrong act, and, if punishment therefor should be inflicted upon him, would not comprehend the reason why he was being punished." *Lee v. State*, 45 S.E. 628, 630 (Ga. 1903); *see In re Lang*, 71 A. 47, 49 (N.J. 1908) (explaining that a mentally ill prisoner cannot be executed unless a "court or a jury has found that he is conscious of having committed a crime, is aware that he is amenable to punishment and is appreciative of his situation as a murderer condemned to death").

The tests that common-law courts have developed for competency to be executed thus focus upon a condemned inmate's rational understanding of the purpose for which the State is about to put him to death. *See, e.g., Ex parte Chesser*, 112 So. 87, 89-90 (Fla. 1927) (holding that, if the inmate is "unable to understand the nature, purpose and effect of the process about to be executed upon him," then the execution shall not be carried out until the inmate "regains his senses"); *State v. Genna*, 112 So. 655, 661 (La. 1927) ("He must be capable of understanding the situation in which he stands and the nature of the proceedings against him."). Scholars have agreed that the common-law standard was "generally said to be whether the condemned man has the capacity to understand the nature and purpose of the punishment about to be executed upon him." Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651, 652 (1951); *see* Wayne LaFave & Austin Scott, *Handbook on Criminal Law* 303 (1972) ("[H]e must be so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him."). As one commentator has suggested:

> [P]erhaps the most convincing purpose for which the rule has been said to exist in modern circumstances is that punishment should not be inflicted upon a person incapable of comprehending the reason why he is punished. Thus in the United States where the common law rules are still operative in many States the tests of insanity adopted consider the mental condition of the prisoner in regards closely connected with the purposes of execution.

J.D. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U. L. Rev. 434, 468 (1964)

(footnotes omitted). Only through a radical divergence from the common-law tradition could a court today conclude – as the Fifth Circuit did below – that it is permissible to execute a psychotic who delusionally believes that the purpose of his execution is to aid and abet the devil by depriving Jesus of the benefits of his ministry.

## II. CONTEMPORARY STANDARDS REQUIRE THE INMATE TO RATIONALLY UNDERSTAND THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT.

### A. State Law

The "clearest and most reliable objective evidence of contemporary values" relevant to the Eighth Amendment is state legislation. *Atkins*, 536 U.S. at 312 (citation omitted). Nineteen states currently have a statutory definition of competency for execution.[23] Of these, 14 states provide that a condemned inmate must "understand the reason" or "know why" he is being punished, or must "understand the purpose" or the "object" of the punishment.[24] These formulas expressly require capability to connect punishment with crime. That capability is probably implied, as well, by three additional statutes that forbid an execution if the inmate is "unaware that he is to be punished for the crime of murder" or "lacks awareness"

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[23] For the Court's convenience, the relevant statutory provisions and case law decisions of the states are set out in Appendix B.

[24] Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Wyoming. The relevant federal statute also provides that: "A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person." 18 U.S.C. § 3596(c).

that he "is to be executed for the crime of murder."[25] The two remaining states with statutory definitions assimilate competency-to-be-executed with competency-to-be-sentenced and forbid an execution if the inmate "lacks capacity" or "is unable" to "understand the proceedings against" him.[26] Thus, *no* state statutory definition expressly permits the execution of someone incapable of connecting the execution to his criminal conviction; three-quarters of the definitions explicitly forbid such an execution;[27] and the remaining quarter most likely forbid it implicitly.

Nine states do not have a statutory standard for determining incompetency,[28] and ten states have no statute at all.[29] No judicial decisions appear to spell out the competency-to-be-executed standard in most of these states. However, in the six states where such decisions are found, at least five require an inmate to be capable of understanding the connection between his conviction of a

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[25] Arizona, Colorado, and Maryland.

[26] Idaho and Montana.

[27] *See, e.g., Provenzano v. State*, 750 So. 2d 597, 602 (Fla. 1999) (noting that Florida's statutory definition "does allow for a prisoner's rational appreciation of the connection between his crime and the punishment he is to receive"); *Billiot v. State*, 655 So. 2d 1, 16 (Miss. 1995) (explaining that the inmate "must comprehend the reasons for the penalty and its implications, he must understand 'the penalty's existence and purpose,' and in order for the retributive goal of the criminal law to be satisfied, he must 'perceive[ ] the connection between his crime and his punishment,' and be 'aware that his death is approaching [so] he can prepare himself for his passing'") (quoting *Ford*, 477 U.S. at 417, 422 (Powell, J., concurring)).

[28] Alabama, California, Connecticut, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, and South Dakota.

[29] Delaware, Illinois, Indiana, New Hampshire, New Jersey, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington.

crime and his execution.[30] The remaining decision is silent on the issue.[31]

In summary, all of the states in which the relevant legal rule can be ascertained with any confidence prohibit the execution of an inmate so lacking in rational understanding that he cannot comprehend the connection between his crime and his execution. The rest of the death penalty states have not reached a different conclusion; they simply have not addressed the issue.

### B. Informed Professional Opinion

This Court has looked to the positions of "organizations with germane expertise" to determine whether the judgment of state legislatures "reflects a much broader social and professional consensus." *Atkins*, 536 U.S. at 316 n.21. That is certainly the case here. The American Psychiatric Association, the American Psychological Association, and the American Bar Association have all adopted position statements regarding the execution of mentally impaired inmates. With minor differences, presently irrelevant, the positions of these national organizations are identical, stating that: "A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . to understand the nature and purpose of the punishment,

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[30] Pennsylvania requires that the inmate comprehend the reasons for the death penalty. Tennessee and Indiana require that he be aware of why he is to suffer it. South Carolina requires that he be able to understand the reason for the punishment, and Oklahoma requires that he be able to understand the punishment's purpose.

[31] The Washington standard says only that an inmate must be "capable of properly appreciating his peril and of rationally assisting in his own defense." *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990).

or to appreciate the reason for its imposition in the prisoner's own case."[32] The supporting commentary to the American Bar Association's resolution makes clear that the standard includes a rational understanding component:

> [The standard] would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution.

American Bar Association, Resolution 122A, *supra*, at 675. The consistency of the professional organizations' standards with state legislative and case law evidence "lends further support to [the] conclusion that there is a consensus among those who have addressed the issue." *Atkins*, 536 U.S. at 316 n.21.

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[32] American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, par. (a) (Dec. 2005), *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf; American Psychological Association, Council Policy Manual: N. Public Interest - Part 2, VIII.2, par. 3(a) (Feb. 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8; American Bar Association, Resolution 122A, par. 3(a) (Aug. 7-8, 2006), in *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

## III. EXECUTING A PERSON INCAPABLE OF RATIONALLY UNDERSTANDING THE CONNECTION BETWEEN HIS CRIME AND HIS PUNISHMENT WOULD NOT SERVE THE PENOLOGICAL PURPOSES OF THE DEATH PENALTY.

The imposition of capital punishment violates the Eighth Amendment when it is excessive, "involv[ing] the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). To execute a person who lacks the mental capacity to understand the causal connection between his crime and his punishment is excessive on two counts. First, execution of such a person does not serve either of the principal penological justifications for the death penalty: "retribution and deterrence of capital crimes." *Id.* at 183. Unless the imposition of the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless infliction of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). Second, executing a person who lacks rational understanding is "uniquely cruel," *Ford*, 477 U.S. at 421 (Powell, J., concurring), because it subjects the prisoner to "fear and pain without comfort of understanding." *Id.* at 410 (majority opinion).

### A. Retribution

Retribution is "the primary justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461 (1984). In retributive theory, capital punishment serves as "an expression of society's moral outrage at particularly

offensive conduct," *Gregg*, 428 U.S. at 183, and is "an attempt to right the balance for the wrong to the victim." *Simmons*, 543 U.S. at 571. Retribution demands that, when the time for execution arrives, the offender be able to recognize death as the price he must pay for his culpable deeds. *See* Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 1031 (1985) ("To give someone her just deserts implies her recognition that those deserts are just."). Society demands that the condemned inmate suffer the anguish of realizing that he is being put to death "for what he did." *Martin v. Dugger*, 686 F. Supp. 1523, 1569 (S.D. Fla. 1988). Because retribution attempts to awaken the conscience of the offender, Gale, *supra*, at 1031-32, it is designed to apply exclusively to rational persons who have the cognitive capacity to answer for their conduct. *See generally* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 57-58 (1986).

Executing a delusional psychotic who believes that a conspiracy of demonic forces is orchestrating his execution does not serve the retributive goal of capital punishment. The condemned's lack of rational understanding severs the critical connection between crime and punishment, destroying his ability to appreciate that his suffering is payback for his offense. *See id.* at 54 ("Because of the immense suffering caused by the prisoner's criminal actions, he is to suffer in anticipation of his death, and this goal cannot be achieved if the prisoner does not appreciate his impending fate because of mental illness.") (footnote omitted); Gale, *supra*, at 1031 n.167 ("[W]e believe punishment appeals, whether successfully or not, to the offender's consciousness and conscience – [this] may help explain our moral distaste for killing those who cannot understand either what we are doing or why we are doing

it."); *Ford v. Wainwright*, 752 F.2d 526, 531 (11th Cir. 1985) (Clark, J., dissenting) (noting that "the social goal of retribution is frustrated when the power of the State is exercised against one who does not comprehend its significance"), *rev'd*, 477 U.S. 399 (1986); American Bar Association, Resolution 122A, *supra*, at 676 ("[T]he retributive purpose of capital punishment is not served by executing an offender who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people."). Under these circumstances, execution serves as vengeance, not retribution.[33]

The absence of any retributive value in executing those who do not possess a rational understanding of the reason for their impending death substantially influenced Justice Powell's formulation of the Eighth Amendment competency standard in *Ford*. *See* 477 U.S. at 421-22 (explaining that, only "[i]f the defendant perceives the connection between his crime and his punishment," is "the retributive goal of the criminal law . . . satisfied"). It also served as one of the mainstays of the *Ford* majority's decision to constitutionalize the common-law rule. *See id.* at 409. Executing a person who lacks the rational understanding needed to make the connection between his crime and his punishment thwarts "the retributive end of ensuring that the criminal gets his just deserts." *Enmund*, 458 U.S. at

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[33] "Retribution focuses on the offender's deserved punishment; revenge focuses on retaliation and tries to satisfy the victim's or society's desire to strike back at the criminal." Gale, *supra*, at 1033 (internal quotation marks and footnote omitted); *see The Essays of Francis Bacon* 34 (S. Reynolds ed., 1890) ("Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out.").

801. Prohibiting such executions "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410.[34]

### B. Deterrence

Most of the common-law authorities concluded, like Coke, that the execution of the insane "should be a miserable spectacle . . . of extream inhumanity and cruelty, and can be no example to others." Coke, *supra*, at 6; *see, e.g.*, *Beverley's Case of Non Compos Mentis*, 76 Eng. Rep. 1118, 1120-21 (K.B. 1598); L. Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* 295 (1833). These writers suggest that the life of an incompetent person can be spared without weakening the deterrent effect of the death penalty. A prospective offender cannot imagine losing his capacity for rational understanding so that he will be spared from execution. Hazard & Louisell, *supra*, at 385. Moreover, an offender's execution can proceed if he regains his sanity, and it can have "the same deterrent effect as if he had been sane throughout." *Id.* Consequently, inflicting capital punishment upon a person who lacks a rational understanding of his predicament is "unnecessary to the accomplishment of the end of deterrence." *Id.* at 386.[35]

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[34] *Thompson v. Oklahoma*, 487 U.S. 815 (1988), cited *Ford* as an example of a case where the Court found a death sentence unconstitutional because the "retributive value is so low." *Id.* at 836 n.44 (plurality opinion).

[35] The "natural abhorrence" society feels at executing the insane, *Ford*, 477 U.S. at 409, also counsels against the practice:

> If the general population shares the opinion that execution of disturbed offenders constitutes cruel, brutal, and barbaric behavior, then the practice could cause the law to diverge

(Continued on following page)

### C. Uniquely Cruel and Inhuman

An inmate who rationally understands the reason for his execution can allay some of the fear and torment he faces by coming to terms with his moral guilt, seeking forgiveness, expressing remorse, making amends, or clearing his conscience. An inmate who does not have this capacity cannot make this expiation.[36] Executing such a person, who is without the "comfort of understanding," *Ford*, 477 U.S. at 410, is a uniquely cruel and inhuman practice that does not "comport[ ] with the basic concept of human dignity at the core" of the Eighth Amendment. *Gregg*, 428 U.S. at 182.

When *Ford* found that executing an insane prisoner would violate the Eighth Amendment, the majority invoked "the natural abhorrence civilized societies feel at killing

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> from conventional morality so drastically that some would consider certain illegal conduct to be not only morally acceptable but morally mandatory. Thus, the [competency-for-execution] requirement might undermine the deterrent effect of capital punishment to some unspecified degree yet serve the preventive function of the criminal law by avoiding a practice that would promote alienation between the law and conventional morality.

Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995, 1016 (1991).

[36] *Compare* Last Statement of Derrick O'Brien (executed Jul. 11, 2006), *available at* http://www.tdcj.state.tx.us/stat/obrienderricklast.htm ("I have always been sorry. It is the worst mistake that I ever made in my whole life. Not because I am here, but because of what I did and I hurt a lot of people – you, and my family. I am sorry; I have always been sorry. I am sorry."), *with* Last Statement of Monty Delk (executed Feb. 28, 2002), *available at* http://www.tdcj.state.tx.us/stat/delkmontylast.htm ("I've got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this.").

one who has no capacity to come to grips with his own conscience or deity." 477 U.S. at 409. Equally concerned, Justice Powell formulated his standard, in part, to alleviate the excessive cruelty involved in dispatching persons who do not have the ability "to prepare, mentally and spiritually, for their death." *Id.* at 421. To execute an inmate laboring under a psychotic delusion about the reason for his execution would be "a uniquely cruel penalty," *id.*, inconsistent with the fundamental premise of the Eighth Amendment that even the most contemptible criminal remains a human being entitled to respect and dignity.[37]

## CONCLUSION

To affirm that the Eighth Amendment forbids the execution of a prisoner so mentally impaired that he cannot "perceive[] the connection between his crime and his punishment," 477 U.S. at 422, implements the constitutional standard that Justice Powell endorsed in *Ford*. It is consistent with the reasons the *Ford* majority gave for holding that the Constitution imposes a substantive restriction on the States' power to execute the insane. It is in the grain of a tradition of decency that has a deep and distinguished pedigree in the common law, yet still retains

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[37] To execute a person "who lacks a rudimentary understanding of the nature and purpose of the proceedings . . . offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object . . . ." Richard Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. Miami L. Rev. 539, 551 (1993) (emphasis in original); *see Caritativo v. California*, 357 U.S. 549, 559 (1958) (Frankfurter, J., dissenting) (explaining that it would be "barbaric" to execute a person who is "mentally unfit to meet his destiny").

contemporary validity. Its approval by state legislatures and state courts without dissent, and by informed national mental health and legal organizations, signifies more than simply historical continuity. It reveals a broad social consensus that a condemned inmate must have the mental capacity to rationally understand the reason for his execution. To execute someone like Scott Panetti, who lacks this rudimentary level of rational understanding, would disserve the penological purposes of the death penalty and would exact a uniquely cruel punishment at odds with the core value of the Eighth Amendment – human dignity.

This Court should reverse the Fifth Circuit's judgment and remand the case so that the District Court can determine Mr. Panetti's competency under the proper constitutional standard.

Respectfully submitted,

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# APPENDIX A

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

**Article 46.05 of the Texas Code of Criminal Procedure**

**Competency to be Executed**

(a) A person who is incompetent to be executed may not be executed.

(b) The trial court retains jurisdiction over motions filed by or for a defendant under this article.

(c) A motion filed under this article must identify the proceeding in which the defendant was convicted, give the date of the final judgment, set forth the fact that an execution date has been set if the date has been set, and clearly set forth alleged facts in support of the assertion that the defendant is presently incompetent to be executed. The defendant shall attach affidavits, records, or other evidence supporting the defendant's allegations or shall state why those items are not attached. The defendant shall identify any previous proceedings in which the defendant challenged the defendant's competency in relation to the conviction and sentence in question, including any challenge to the defendant's competency to be executed, competency to stand trial, or sanity at the time of the offense. The motion must be verified by the oath of some person on the defendant's behalf.

(d) On receipt of a motion filed under this article, the trial court shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:

(1) the motion, any attached documents, and any responsive pleadings; and

(2) if applicable, the presumption of competency under Subsection (e).

(e) If a defendant is determined to have previously filed a motion under this article, and has previously been determined to be competent to be executed, the previous adjudication creates a presumption of competency and the defendant is not entitled to a hearing on the subsequent motion filed under this article, unless the defendant makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed at the time of filing the subsequent motion under this article.

(f) If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed.

(g) If the trial court does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion.

(h) A defendant is incompetent to be executed if the defendant does not understand:

(1) that he or she is to be executed and that the execution is imminent; and

(2) the reason he or she is being executed.

(i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

(j) By filing a motion under this article, the defendant waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the defendant is incompetent to be executed.

(k) If, on the basis of reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing, the trial court makes a finding by a preponderance of the evidence that the defendant is incompetent to be executed, the clerk shall send immediately to the court of criminal appeals in accordance with Section 8(d), Article 11.071, the appropriate documents for that court's determination of whether any existing execution date should be withdrawn and a stay of execution issued. If a stay of execution is issued by the court of criminal appeals, the trial court periodically shall order that the defendant be reexamined by mental health experts to determine whether the defendant is no longer incompetent to be executed.

(l) If the trial court does not make the finding as described by Subsection (k), the court may set an execution date as otherwise provided by law.

## APPENDIX B

## COMPETENCE TO BE EXECUTED: STATUTORY AND CASE LAW STANDARDS

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| **1. Alabama** | "If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence . . . ."<br>Ala. Code § 15-16-23 (2006). | No case law. |
| **2. Arizona** | "A person who is sentenced to death shall not be executed as long as he is mentally incompetent to be executed."<br><br>"As used in this article, 'mentally incompetent to be executed' means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death."<br>Ariz. Rev. Stat. § 13-4021 (A),(B) (2006). | |
| **3. Arkansas** | "[A]n individual under sentence of death is not competent [to be executed when], due to mental illness, [he or she does not] understand the nature and reasons for that punishment . . . ."<br>Ark. Code § 16-90-506(d)(1) (2006). | |
| **4. California** | If the warden has "good reason to believe that a defendant, under judgment of death, has become insane," he must notify the | Since 1850, competency for execution has been governed by statute in California. *Ex parte Phyle*, 186 |

* No case law is provided for those states that have an explicit statutory definition of incompetency.

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | district attorney for the county in which the prison is located. The district attorney is required to notify the court, which must in turn convene a jury to decide the issue.<br><br>"[W]hen it is found that the defendant is insane, the order must direct that he be taken to a medical facility of the Department of Corrections, and there kept in safe confinement until his reason is restored."<br>Cal. Penal Code §§ 3701, 3703 (2007). | P.2d 134, 139 (Cal. 1947), *cert. granted, Phyle v. Duffy*, 333 U.S. 841, *and cert. dismissed*, 334 U.S. 431 (1948). The current statutory scheme, enacted in 1941, is a continuation of the provisions in place since at least 1905, *id.*, though the procedures and authority for decision-making have been amended. Applying the insanity provisions in 1918, the Supreme Court of California stated:<br><br>"The evidence on the question of insanity was amply sufficient to support the conclusion that the defendant was sane, within the meaning of the law applicable. That he was not perfectly poised mentally may be freely conceded. Such, however, is not the test. There was no substantial showing to the effect that his mind was in such a condition that he did not rightly comprehend his own condition with reference to the proceedings against him that he had been convicted of a crime punishable by death, and was before the court for the purposes of judgment on that conviction, or that he was then unable to present in a rational manner any defense that he might have, either on motion for new trial or to the pronouncing of judgment."<br><br>*People v. Lawson*, 174 P. 885, 888 (Cal. 1918). |
| **5. Colorado** | "'Mentally incompetent to be executed' means that, due to a mental disease or defect, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | crime is death."<br>Colo. Rev. Stat. § 18-1.3-1401(2) (2006). | |
| **6. Connecticut** | If a prisoner "awaiting execution of a sentence of death appears to the warden thereof to be insane," the warden may apply to the court, which may in turn have the prisoner examined by physicians. "Upon return to said court or such judge of a certificate by such physicians, or a majority of them, stating that such person is insane, said court or such judge shall order the sentence of execution to be stayed and such person to be transferred to any state hospital for mental illness for confinement . . . ."<br>Conn. Gen. Stat. § 54-101 (2007). | No case law. |
| **7. Delaware** | No statute. | No case law. |
| **8. Florida** | An inmate is incompetent to be executed if he "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him."<br>Fla. Stat. Ann. § 922.07(3) (2006).<br><br>"A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it."<br>Fla. R. Crim. Pro. 3.811(b) (2006). | |
| **9. Georgia** | An inmate is incompetent to be executed if "because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment."<br>Ga. Code Ann. § 17-10-60 (2006). | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| **10. Idaho** | "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures."<br>Idaho Code § 18-210 (2006). | |
| **11. Illinois** | No statute. | Until 1994, an Illinois statute mandated that a "defendant is considered unfit to be executed only if, because of a mental condition, he is unable to understand the nature and purpose of such sentence." *People v. Owens*, 564 N.E.2d 1184, 1186 (Ill. 1990) (citing Ill. Rev. Stat. 1989, ch. 38, par. 1005-2-3). The Illinois statute was repealed in 1994 and has not been replaced. *People v. Johnson*, 730 N.E.2d 1107, 1115 (Ill. 2000) ("Our legislature, however, has since repealed section 5-2-3 . . . and has not adopted a statutory provision delineating procedures for raising and determining fitness for execution . . . ."). |
| **12. Indiana** | No statute. | "*Ford v. Wainwright* holds that the Eighth Amendment prohibits a state from executing persons who are insane at the time of execution. In this context, persons are insane if they are unaware of the punishment they are about to suffer and why they are to suffer it." *Baird v. State*, 833 N.E.2d 28, 29 (Ind. 2005) (internal citation and quotation marks omitted). |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| **13. Kansas** | "At any time prior to execution, a convict under sentence of death, such convict's counsel or the warden of the correctional institution or sheriff having custody of such convict may request a determination of the convict's sanity by a district judge of the judicial district in which such convict was tried and sentenced . . . . If the district judge determines that there is sufficient reason to believe that the convict is insane, the judge shall suspend the execution and conduct a hearing to determine the sanity of the convict."<br><br>"If, at the conclusion of a hearing pursuant to this section, the judge determines that the convict is insane, the judge shall suspend the execution until further order."<br>Kan. Stat. Ann. § 22-4006(a),(d) (2005). | No case law. |
| **14. Kentucky** | "If the condemned person is insane, as defined in KRS 431.213 . . . , on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity . . . ."<br>Ky. Rev. Stat. § 431.240 (2006).<br><br>"'Insane' means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed."<br>Ky. Rev. Stat. § 431.213 (2006). | |
| **15. Louisiana** | "A person who is not competent to proceed to execution may not be executed."<br><br>"A person is not competent to proceed to execution when a defendant presently lacks the competence to understand that he | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | is to be executed, and the reason he is to suffer the penalty."<br>La. Rev. Stat. § 15:567.1(A),(B) (2006). | |
| **16. Maryland** | An inmate is incompetent to be executed if, "as a result of a mental disorder or mental retardation," the inmate "lacks awareness: (i) of the fact of the inmate's impending execution; and (ii) that the inmate is to be executed for the crime of murder."<br>Md. Code Ann., Correctional Services, § 3-904(a)(2) (2006). | |
| **17. Mississippi** | "If it is found that the convict is insane, as defined in this subsection, the court shall suspend the execution of the sentence."<br><br>"[A] person shall be deemed insane if the court finds the convict does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."<br>Miss. Code Ann. § 99-19-57(2)(a),(b) (2006). | |
| **18. Missouri** | "No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out."<br>Mo. Ann. Stat. § 552.060(1) (2006). | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| **19. Montana** | "If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title."<br>Mont. Code Ann. § 46-19-201 (2005).<br><br>"A person who, as a result of mental disease or defect or developmental disability, is unable to understand the proceedings against the person or to assist in the person's own defense may not be . . . sentenced for the commission of an offense so long as the incapacity endures."<br>Mont. Code Ann. § 46-14-103 (2005). | |
| **20. Nebraska** | "[I]f, after judgment and before execution of the sentence, such person shall become mentally incompetent, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the incompetency."<br>Neb. Rev. Stat. § 29-1822 (2006).<br><br>"If any convict under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict."<br><br>"If the judge shall determine that a commission ought to be appointed to examine such convict, he or she shall make a finding to that effect and cause it to be entered upon the records | Since at least 1901, if not earlier, the procedures for determining insanity for the purpose of execution have been regulated by statute. *In re Grammer*, 178 N.W. 624, 625 (Neb. 1920). However, "it was not the purpose of the statute to do away with the definition of insanity as it was understood in such cases at common law." *Id.* at 626.<br><br>Applying the common law standard, the Nebraska court held that "Grammer, before he could reasonably ask a suspension of his execution in this court, should have made a showing here that he has become insane, not in some slight or peculiar or classical degree, but that his state of mind and mental condition are such that he does not understand, and is incapable of understanding, the nature of the proceedings against him and of his impending fate and execution, and |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution . . . ."<br><br>"If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order."<br>Neb. Rev. Stat. § 29-2537 (2006). | therefore is unable, in a rational manner, to offer a defense or make objection to execution." *Id.*<br><br>Although the procedures for determining competency for execution have varied over time, there has been no alteration of the competency standard. "Statutes are not to be understood as affecting any change in the common law beyond that which is clearly indicated." *Ebert v. Wenzl*, 260 N.W. 480, 482 (Neb. 1977). |
| **21. Nevada** | "If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death until the convicted person becomes sane, and shall therein order the director of the department of corrections to confine such person in a safe place of confinement until his reason is restored."<br>Nev. Rev. Stat. § 176.455(1) (2005). | No case law. |
| **22. New Hampshire** | No statute. | No case law. |
| **23. New Jersey** | No statute. | "If, therefore, a person sentenced for a crime is capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defence in a rational manner, he is, for the purpose of undergoing punishment, deemed to be sane, although on some other subjects his mind may be deranged or unsound." *In re Lang*, 71 A. 47, 48 (N.J. 1908). |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | | "[W]e are not willing to adopt the view that in cases where the law has decreed that a murderer should be put to death, and the court or a jury has found that he is conscious of having committed a crime, is aware that he is amenable to punishment, and is appreciative of his situation as a murderer condemned to death, he shall be permitted to escape just punishment because of a mental infirmity which has no bearing on any of these features of the case." *Id.* at 49. |
| **24. New Mexico** | "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the state penitentiary is situated, whose duty it is to immediately file in the district court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon it shall be the duty of said court to inquire into said question and render judgment thereon."<br><br>"When it is found that the defendant is insane, the order shall direct that the defendant be taken to the New Mexico behavioral health institute at Las Vegas, and there kept in safe confinement until his reason is restored."<br>N.M. Stat. Ann. §§ 31-14-4, 31-14-6 (2006). | "Sanity" for the purposes of execution is not defined by statute but has a clear definition in the common law of New Mexico. In *In re Smith*, the court held:<br><br>"If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be executed."<br><br>176 P. 819, 823 (N.M. 1918).<br><br>In New Mexico, "[i]n criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | | states of the Union, shall govern." N.M. Stat. Ann. § 30-1-3 (2006); *see also State v. Bryant*, 655 P.2d 161, 162 (N.M. 1982) ("A statute designed to effect a change from that which existed under the common law must be strictly construed; it must speak in clear and unequivocal terms and the presumption is that no change is intended unless the statute is explicit."). |
| **25. New York** | "The state may not execute an inmate who is incompetent. An inmate is 'incompetent' when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out."<br>N.Y. Correct. Law § 656(1) (2007). | |
| **26. North Carolina** | "No person may be . . . punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner."<br>N.C. Gen. Stat. § 15A-1001 (2006). | |
| **27. Ohio** | "As used in this section and section 2949.29 of the Revised Code, 'insane' means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict."<br>Ohio Rev. Code Ann. § 2949.28(A) (2006).<br><br>"If it is found that the convict is insane and if authorized by the supreme court, the judge shall continue any stay of execution of the sentence previously issued, order the convict to be confined | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | in the area at which other convicts sentenced to death are confined or in a maximum security medical or psychiatric facility operated by the department of rehabilitation and correction, and order treatment of the convict." Ohio Rev. Code Ann. § 2949.29(B) (2006). | |
| **28. Oklahoma** | "[I]f it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order." Okla. Stat. Ann. tit. 22, § 1008 (2006) (footnote omitted). | "Before an inmate may be put to death, he must have: 'sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court.'" *Fisher v. State*, 845 P.2d 1272, 1276 n.3 (Okla. Crim. App. 1992) (quoting *Bingham v. State*, 169 P. 2d 311, 314-15 (Okla. Crim. App. 1946)). |
| **29. Oregon** | "Notwithstanding any other provision in this section, if the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications." Or. Rev. Stat. § 137.463(6)(a) (2005). | |
| **30. Pennsylvania** | No statute. | "The Commonwealth may not execute someone who does not 'comprehend[] the reasons for the death penalty and its implications.'" *Commonwealth v.* |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | | *Haag*, 809 A.2d 271, 277 (Pa. 2002) (quoting *Commonwealth v. Jermyn*, 652 A.2d 821, 824 (Pa. 1995)). |
| **31. South Carolina** | No statute. | An inmate is incompetent to be executed if the inmate fails on either prong of a two-prong test: "The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel." *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993). |
| **32. South Dakota** | "If the commission [of physicians appointed by the Governor] finds the defendant mentally incompetent to proceed the Governor shall suspend the execution of sentence and may in his discretion order the defendant removed to the Human Services Center, there to remain confined until he is no longer mentally ill."<br>S.D. Codified Laws § 23A-27A-24 (2006). | No case law. |
| **33. Tennessee** | No statute. | "[O]nly those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve." *Van Tran v. State*, 6 S.W.3d 257, 266 (Tenn. 1999). |
| **34. Texas** | "A defendant is incompetent to be executed if the defendant | |

| Jurisdiction | Statute | State Case Law Interpreting Standard* |
|---|---|---|
| | does not understand: (1) that he or she is to be executed and the execution is imminent; and (2) the reason he or she is being executed."<br>Tex. Code Crim. Proc. art. 46.05(h) (2006). | |
| **35. Utah** | An inmate is incompetent to be executed "if, due to mental condition, an inmate is unaware of either the punishment he is about to suffer or why he is to suffer it."<br>Utah Code Ann. § 77-19-201 (2006). | |
| **36. Virginia** | No statute. | No case law. |
| **37. Washington** | No statute. | "[A] defendant is competent to be executed if he 'is capable of properly appreciating his peril and of rationally assisting in his own defense [and] that this standard [ability to assist] applies equally in the context of a person's insanity at the time of the punishment as it does at the time of trial.'" *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990). |
| **38. Wyoming** | "If the court finds that the convict does not have the requisite mental capacity, the judge shall suspend the execution of the convict."<br>Wyo. Stat. § 7-13-903(a) (2006).<br><br>"'Requisite mental capacity' means the ability to understand the nature of the death penalty and the reasons it was imposed."<br>Wyo. Stat. § 7-13-901(a)(v) (2006). | |

No. 06-6407

Supreme Court, U.S.
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# In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR RESPONDENT

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## CAPITAL CASE

## QUESTIONS PRESENTED

1. Does the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) require deference to the state court's determination that Panetti is competent to be executed – and thereby statutorily preclude Panetti's request for federal habeas relief?

2. Does the Eighth Amendment prohibit execution of a validly convicted capital murderer who, despite his mental illness, knows that he committed capital murder and has been found as a factual matter to have the capacity to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death?

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## STATEMENT OF THE CASE

### A. The Crime

Scott Louis Panetti has led a troubled and violent life. Between 1981 and 1992, Panetti was hospitalized on multiple occasions and variously diagnosed with substance abuse and dependence, personality disorders, depression, chronic undifferentiated schizophrenia, and schizoaffective disorder. JA 339-41;[1] Federal Petition for Writ of Habeas Corpus, No. 1:99-CV-00260 (W.D. Tex. Sept. 7, 1999) (hereinafter "Federal Petition") (Ex. 14). Although his doctors initially treated him only with therapy, they later placed him on medication, which proved effective in controlling his mental illness. *Id.*, at 462-63 (noting in 1986 that, while taking medication, Panetti "shows no evidence of thought disorder" and "was not paranoid in his attitude"), 466 (observing in 1990 that, after Panetti was stabilized on his medication, he displayed no evidence of "any delusions or any psychotic thinking, or any suicidal or homicidal ideations").

Panetti married his second wife, Sonja, in 1988, and they had a daughter the following year. 31.RR.61. In August 1992, Sonja separated from Panetti because of his drinking and physical threats. 31.RR.62. She took their daughter, then three years old, to live with her parents, Amanda and Joe Alvarado. 31.RR.60-61. Panetti later called to threaten Sonja and his in-laws, saying he would kill both her and the Alvarados or burn down their house. 31.RR.64. On September 2, 1992, in response to these threats, Sonja obtained a protective order against Panetti. 31.RR.65-66; 41.RR (SX 91).

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[1] Citations to the transcript of Panetti's capital-murder trial are noted as "RR" ("Reporter's Record"). Citations to the State's exhibits admitted into evidence during those proceedings are noted as "SX" ("State Exhibit"). Citations to the pleadings, orders, and motions filed in the trial court are noted as "CR" ("Clerk's Record"). Citations to the federal district court's hearing on execution competence are noted as "FH" ("Federal Hearing"). Citations to the joint appendix filed in this Court are noted as "JA."

Six days later, Panetti awoke before dawn, 33.RR.695, shaved his head, 31.RR.95-96, and dressed himself in camouflage, 33.RR.679. Arming himself with a rifle, a sawed-off shotgun, 33.RR.696, and several knives, 33.RR.706-07, Panetti drove to the Alvarados' house, 33.RR.696. When he arrived, Panetti broke his shotgun trying to shatter a sliding glass door near Sonja's bed. 31.RR.69; 33.RR.717. He chased Sonja out of the house and confronted her in the front yard, 33.RR.704, hitting her face with the butt of his rifle, 31.RR.73.

Although Sonja managed to retreat into the house and lock the front door, Panetti shot the lock off and cornered Joe and Amanda Alvarado in the kitchen. 31.RR.42-43; 33.RR.705. He asked Sonja, who was standing in the adjoining hallway, who she would like to see die first. 31.RR.84. Using his rifle, Panetti then shot and killed Joe Alvarado. 31.RR.84. Sonja begged Panetti not to kill her mother, 31.RR.91, but Panetti pressed the rifle against Amanda Alvarado's chest and pulled the trigger, 32.RR.417-18, killing her and spraying Sonja and their daughter with blood, 31.RR.91. Then his rifle jammed. 31.RR.92.

Panetti grabbed Sonja and their daughter and walked them out to his Jeep. 31.RR.92-93. He drove them back to his bunkhouse, 31.RR.94, where he had them wash off the blood, 31.RR.96. When Sonja asked if she could go check on her parents, he responded: "I just shot your parents. No more mommy, no more daddy; get that through your head." 31.RR.96-97. He then forced Sonja to read the protective order aloud. 31.RR.97-98. Sonja asked Panetti if he planned to shoot her and her daughter. 31.RR.98. He replied that he had not yet decided. 31.RR.98.

At dawn, Panetti allowed both Sonja and their daughter to leave the bunkhouse, telling Sonja that he planned to stay there and "shoot two or three policemen" before taking his own life. 31.RR.101. Panetti surrendered to police that afternoon. 31.RR.241. Later the same day, Panetti confessed to the murders, recounting the details of the crime to police. 33.RR.692-737. When asked if he

thought that his mental condition excused his behavior, Panetti replied, "it doesn't excuse me from any of that. You know, I made my bed and I'm going to lie in it. . . . I f***ed up. I feel a lot of remorse." 33.RR.734-35; see also JA 208.

Dr. Michael Lennhoff, a psychiatrist, interviewed Panetti several times at the local jail. Panetti stated that he had followed his drug regimen over the preceding year, but he later confessed that he had not taken his medication for one week before the murders. Federal Petition Ex. 14, at 431, 436. Although Dr. Lennhoff noted that Panetti exhibited genuine mental illness, he also concluded that "Panetti may have wanted to impress me with how mentally disturbed he is, perhaps in an exaggerated way." *Id.*, at 434. After a later meeting, Dr. Lennhoff felt that Panetti was "still trying to impress me as not having committed a deliberate crime." *Id.*, at 436.

### B. Panetti's Exhaustively Affirmed Conviction and Sentence and the Rejection of His Alleged Incompetence to Stand Trial and to Waive Counsel

Panetti was charged with capital murder. 1.CR.8. The trial court appointed Dr. E. Lee Simes, a psychiatrist, to evaluate Panetti's competence for trial. JA 9. Dr. Simes noted that, despite Panetti's delusional thinking, "his overall story was quite consistent and insightful." JA 13. In particular, Dr. Simes observed that Panetti understood why he was facing capital-murder charges, the significance of those charges, and the significance of the punishment he might receive. JA 13. Panetti also displayed ability to process questions and information and to assist in his defense. JA 13. Dr. Simes concluded that Panetti was competent to stand trial. JA 13.

In April 1994, Panetti moved for a competence hearing. 2.CR.236-41. In the first trial-competence hearing, the jury deadlocked at four for incompetent, three for competent, and five undecided. 3.CR.295-96; 10.RR.379.[2] At the

[2] Panetti incorrectly reports the final vote as nine-to-three in favor of incompetence. Panetti Br. 8, n.6. That vote occurred earlier in the deliberations. 3.CR.290.

second trial-competence hearing, the jury found Panetti competent to stand trial. 13.RR.206-07.

Eight months later, Panetti sent the trial judge a letter explaining that he had stopped taking all medication and, as a result, was "restored to sanity"; he had dismissed his attorneys; he felt competent to represent himself; he did not intend to "act like a lawyer" in his trial; and he would be able to prove that he was insane at the time of the murders. 3.CR.360. Panetti's attorneys then moved to withdraw as his counsel. 3.CR.363-64.

The trial court called a pretrial hearing to inquire further into Panetti's expressed desire to represent himself. 15.RR.5. The judge told Panetti that he personally did not want Panetti to represent himself, 15.RR.10, and asked Panetti's attorneys to confer privately with Panetti about waiving counsel, 15.RR.11. After this consultation, Panetti's attorneys reported that they did not think Panetti should represent himself, but that was his "clear intent." 15.RR.12-13. Panetti confirmed that he wanted to represent himself because he had the right to do so under Texas law and the United States Constitution, and that he was "fully aware" of the penalty for the charges against him. 15.RR.18. Panetti then executed a voluntary waiver of counsel. 3.CR.369. The district attorney informed the court that, because the State was "concerned about protecting the Defendant's rights," he did not want Panetti's attorneys to withdraw. 15.RR.24. When the court reexamined Panetti about his decision, Panetti replied, "I understand everything that's been going on today, sir. I do, however, feel a little bit insulted that I have been asked the same question so many times, Your Honor." 15.RR.25-28. The court held that Panetti had voluntarily and intelligently exercised his right to represent himself and then appointed standby counsel for Panetti. 15.RR.29-30.

At trial, Panetti entered a plea of not guilty by reason of insanity. 31.RR.24. In his rambling opening statement, Panetti informed the jury that he had been diagnosed with paranoid schizophrenia and manic depression in 1986, and that he believed only an insane person could prove the

insanity defense. 31.RR.28-29. As Panetti explains in his brief, he exhibited bizarre and incoherent behavior throughout his trial. Panetti Br. 11-15. He did call as witnesses two psychiatrists who had previously treated him, 38.RR.1567-1616, and endeavored to establish through one that, when he did not take his medication, his mental illness could prevent him from distinguishing right and wrong, 38.RR.1574-75. The jury nonetheless found Panetti guilty of capital murder and sentenced him to death. 7.CR.1041-44; 38.RR.1685; 39.RR.102. The Texas Court of Criminal Appeals (CCA) affirmed Panetti's conviction and sentence, *Panetti* v. *Texas*, No. 72,230 (Tex. Crim. App. Dec. 3, 1997) (unpublished), and the Court denied certiorari, 525 U.S. 848 (1998) (Mem.).

Panetti then filed a state habeas petition raising fourteen claims, including whether he was competent to stand trial and competent to waive counsel. State Petition for Writ of Habeas Corpus, No. 3310-A, at 3-4 (Tex. Crim. App. June 19, 1997). The CCA denied relief. *Ex parte Panetti*, No. 37,145-01 (Tex. Crim. App. May 20, 1998) (*per curiam*) (unpublished). Panetti next filed a federal habeas petition, asserting the same fourteen claims that he had alleged in his state habeas petition. See JA 355. The district court denied this petition, *Panetti* v. *Johnson*, No. 99-CV-260 (W.D. Tex. Mar. 9, 2001), but granted a certificate of appealability on, *inter alia*, whether Panetti was competent to stand trial and competent to waive counsel, *Panetti* v. *Johnson*, No. 99-CV-260 (W.D. Tex. June 3, 2001). The court of appeals denied habeas relief, *Panetti* v. *Cockrell*, 73 Fed. Appx. 78 (CA5 2003) (unpublished), and the Court again denied certiorari, *Panetti* v. *Dretke*, 540 U.S. 1052 (2003) (Mem.).

In sum, one jury and four courts rejected Panetti's trial-incompetence claim; one court found him competent to waive counsel and four courts rejected his collateral challenge to that determination; and another jury and two courts rejected his insanity defense. No judge or jury has ever found him incompetent.

### C. Panetti's Efforts to Prove Incompetence To Be Executed in State and Federal Court

Once an execution date was set, Panetti filed a motion in the state trial court under Texas Code of Criminal Procedure Article 46.05 asserting incompetence to be executed. JA 355. After concluding that Panetti had failed to make a substantial showing of incompetence, the state court denied his Article 46.05 motion, JA 355, and the CCA dismissed his appeal, *Ex parte Panetti*, No. 74,868 (Tex. Crim. App. Jan. 28, 2004) (*per curiam*) (unpublished).

Panetti then filed a habeas petition in federal district court, asserting that *Ford* v. *Wainwright*, 477 U.S. 399 (1986), prohibited his execution. JA 355-56. The district court granted a stay of execution and allowed Panetti an opportunity to present his renewed allegations to the state trial court. JA 357.

In response to Panetti's second Article 46.05 motion, the state court appointed two neutral experts, Dr. George Parker and Dr. Mary Anderson, to assess Panetti's competence to be executed. JA 59. After conducting a joint interview of Panetti, Drs. Parker and Anderson filed a report documenting their observations and conclusions. JA 70-76. This report reflects Panetti's hostility to Drs. Parker's and Anderson's questions, his tendency toward religious conversation, his attempted manipulation of the interview process, and his general refusal to cooperate with the court-appointed experts. JA 70-73, 75.

Because of Panetti's refusal to cooperate, Drs. Parker and Anderson also relied on several sources of collateral data – including prison records; letters that Panetti had recently written to friends and family; court documents, including documents relating to other competence determinations; discussions with prison staff; and another expert evaluation of Panetti – to help form their relevant opinions. JA 73-75. Based on these data and their personal observations, Drs. Parker and Anderson concluded that Panetti (1) "knows that he is to be executed, and that his execution will result in his death" and (2) "has the ability to understand the reason he is to be executed." JA 75.

In response, Panetti filed a detailed submission criticizing Drs. Parker and Anderson's methodology and contrasting their conclusions with those in a psychiatric evaluation that Panetti had previously presented to the court. JA 79-98. After considering that submission, the state court again denied relief under Article 46.05. JA 99.

Panetti then sought habeas relief in the federal district court, JA 375, which concluded that the state court's determination of Panetti's competence to be executed was not entitled to AEDPA deference because Panetti allegedly failed to receive constitutionally sufficient process, JA 359-61. After granting Panetti's motions for appointment of counsel, discovery, and funds for expert and investigative assistance, JA 358, the district court held an evidentiary hearing on competence, JA 362.

At the hearing, Panetti presented expert testimony from Dr. Mary Alice Conroy, a psychology professor, JA 136; Dr. Susan Rosin, a psychologist, JA 198; Dr. Seth Silverman, a forensic psychiatrist, JA 219; and Dr. Mark Cunningham, a clinical and forensic psychologist, JA 323. The State presented expert testimony from Dr. Parker and Dr. Anderson – the neutral experts that the state trial court had appointed – and lay testimony from Steve Miller, Major of Correctional Officers for the prison in which Panetti is incarcerated, JA 275-76; Terri Hill, a Texas Department of Criminal Justice (TDCJ) Lieutenant assigned to Panetti's housing area, 1 FH 192; and Victoria Williams, a TDCJ security officer who frequently conversed with Panetti, 1 FH 199.

All of the expert witnesses agreed that Panetti suffers from some degree of mental illness. Although some of the experts labeled this illness schizophrenia or schizoaffective disorder, *e.g.*, JA 144-45, 205, they were collectively unable to agree on a single diagnosis, see JA 239, 313.[3]

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[3] Dr. Conroy noted that "the major portion of our population in our inpatient units in federal Bureau of Prisons hospitals are diagnosed with some form of schizophrenia," JA 142, and Dr. Silverman opined that most schizophrenics are competent to be executed, JA 227.

The experts did agree, however, that Panetti has the capacity to – and does, in fact – understand that he will be executed. JA 147-48, 207, 236, 243, 245.[4]

Further expert testimony established Panetti's specific understanding that he committed the murders. Indeed, Dr. Rosin testified that Panetti recounted details of his activity on the day of the murders and expressed sorrow for having committed the crime. JA 208; see also JA 148-49 (Dr. Conroy's testimony that Panetti believed that God had forgiven him for killing the Alvarados and had "wiped the slate clean"). Dr. Silverman testified to uncertainty about whether Panetti knows that he killed the Alvarados, but only because Panetti steadfastly refused to answer his questions on this topic. JA 221.

Several experts also concluded that Panetti's delusions created a false sense of the true reason for his execution. *E.g.*, JA 149, 156, 202, 209 (testimony from Drs. Conroy and Rosin that Panetti believes his execution was ordered to prevent him from preaching the Gospel). Importantly, however, these same experts testified that Panetti understands that the State's stated reason for his execution is punishment for capital murder. JA 157, 214.

Dr. Parker testified that portions of Panetti's responses to the experts' execution-competence examinations could be attributed to malingering, see JA 241-43; see also, *e.g.*, JA 174, 177, 181 (noting additional reports of Panetti's suspected malingering in the past), and Drs. Parker and Anderson each specifically testified that Panetti has

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[4] Lay testimony corroborated this point. Major Miller testified that Panetti cooperated with him in going over the State's pre-execution forms, JA 281, II-42-53, and demonstrated his understanding of the forms' questions about disposition of assets, choice of last meal, and the like. JA 287-88. Additional lay testimony reflected Panetti's demonstrated ability to communicate coherently – and politely – with prison staff. *E.g.*, 1 FH 193-96 (testimony of Terri Hill); 1 FH 200 (testimony of Victoria Williams).

the capacity to understand the reason for his execution, JA 245, 247, 303-04. Both Dr. Parker and Dr. Anderson emphasized that Panetti was deliberately manipulative and uncooperative during his interview with them. JA 239-40, 244-46, 271, 300, 303, 312-14; accord JA 75. They based their ultimate conclusions on Panetti's overall cognitive functionality, as demonstrated through letters he wrote to friends and family, his logical responses to interview questions, and his ability to understand such things as history and movies. JA 242-43, 302-04.

Dr. Parker's suspicions of malingering were corroborated by evidence of psychiatric evaluations conducted in the two years following Panetti's capital trial. For example, Dr. Michael Gilhousen noted that loosening of Panetti's thought processes "appeared to be intentional on his part to create the impression of mental illness." JA 167, II-30. After another interview, Dr. Gilhousen described Panetti's behavior as "obviously manipulative and theatrical." JA 171-72, II-20. Another doctor expressed the belief that Panetti's switching among different voices was "contrived . . . to impress us or lead us to believe that he did have alter personalities." JA 170, II-41.

After hearing all the evidence, the federal district court made three factual findings. First, based on the experts' agreement, the court concluded that Panetti is aware that he will be executed. JA 372.

Second, the district court found that Panetti is aware that he committed both murders. JA 372. The court based this conclusion on Dr. Conroy's and Dr. Rosin's testimony that Panetti knows that he murdered the Alvarados. JA 372. Although the court recognized that Dr. Silverman's testimony cast doubt on this conclusion, the court discounted that testimony, noting that it was based on Panetti's limited responses during his interview with Dr. Silverman. JA 372.

Third, the district court found that Panetti understands the State's stated reason for execution. JA 372. The court based this finding on the testimony of Drs.

Conroy and Rosin, and discounted Dr. Silverman's contrary testimony for the same reason. JA 372-73.

Additionally, the district court recounted Dr. Parker's and Dr. Anderson's assessments that "some portion of Panetti's behavior could be attributed to malingering," and it expressly concluded that, although all of the experts had agreed Panetti had "some degree" of mental illness, their testimony collectively "casts doubt on the extent of Panetti's mental illness and symptoms." JA 363.

Finally, the district court noted Dr. Cunningham's testimony that "suggests" that Panetti's delusions prevent him from understanding that Texas is a lawfully constituted authority and lead him to believe that the State "is in league with the forces of evil that have conspired against him," and it observed that this testimony was consistent with the testimony of Panetti's other experts. JA 373. The court made no finding, however, whether these delusions were genuine or the partial product of malingering, because the court deemed it irrelevant to the question of whether Panetti "knows the reason for his execution" within the meaning of the court of appeals's execution-competence test. JA 373.

Based on these factual findings, the district court concluded that Panetti is competent to be executed. JA 373. Although the court denied Panetti's habeas petition, it stayed his execution pending appeal, JA 373, and granted a certificate of appealability, *Panetti* v. *Dretke*, No. 04-CA-042 (W.D. Tex. Nov. 4, 2004). The court of appeals affirmed the district court's denial of habeas relief, *Panetti* v. *Dretke*, 448 F.3d 815 (CA5 2006); JA 374-84, and the Court granted certiorari, JA 387.

## SUMMARY OF THE ARGUMENT

In devoting fully half of his brief to his statement of the case, Panetti endeavors to focus the Court's attention on his lengthy mental-health history, explaining that "incompetency runs like a fissure through every proceeding in this case." Panetti Br. 6. But that fissure has been mostly sealed once and for all by the conclusive determinations of state

and federal courts repeatedly rejecting Panetti's direct and collateral challenges to adverse rulings on his insanity defense, his competence to stand trial, and his competence to waive counsel. For that reason, Panetti correctly concedes that, as a matter of law, he is now presumed competent to be executed. *Ibid.*

The state court, the district court, and the court of appeals have all concluded that Panetti has failed to overcome that presumption. The district court found as a factual matter that Panetti knows that he murdered the Alvarados, that he will be executed, and that the State's stated reason for executing him is that he committed two murders. Panetti has not challenged those factual findings on appeal.

Distilled to its core, Panetti's case does not turn on the weighing of his mental-health history or a reconsideration of his capital trial, but rather on the resolution of two purely legal issues: (1) whether the state court's determination of execution competence was entitled to AEDPA deference; and (2) whether the Eighth Amendment requires a capital convict to have a "rational understanding" of the reason for his execution.

Panetti virtually ignores the first question, but it alone is dispositive. His sole argument against AEDPA deference is that the state court's competence ruling violated his procedural-due-process rights under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), because the court did not conduct a full evidentiary hearing or appoint a psychiatric expert to submit evidence on his behalf. But *Ford* does not extend any such guarantee, requiring only an opportunity to be heard and an impartial tribunal – both of which Panetti received. Because the state-court procedures were adequate under *Ford*, the AEDPA statutorily bars Panetti's request for habeas relief.

Even if AEDPA deference were not due the state court's findings, the Court still should affirm the court of appeals's judgment that Panetti is competent to be executed. There is no disputing that, under *Ford*, it violates the Eighth Amendment to execute the insane. The only

merits question here is what is the proper standard for measuring "insanity." The court of appeals correctly rejected Panetti's claim that the proper standard is whether a defendant "rationally understands" the reason for his capital sentence. Although the Court has not yet resolved this question, its approach to Eighth Amendment questions leaves no doubt that "rational understanding" is not the constitutional threshold of execution competence.

The Court's usual empirical bases for evaluating the constitutionality of punishments – eighteenth-century practice and modern state legislation – do not settle the issue. The vague standards for execution competence that courts applied at the time of the Bill of Rights, when today's diagnostic methods were unknown, do not translate into any definitive level of understanding that the Court could identify as the constitutional minimum. And because only half of the death-penalty States have any statutory definition of execution competence – and even those States diverge in their definitions – there is no consensus in contemporary values on this point.

The Court is left, then, to exercise its own independent judgment in defining the level of mental incapacity that renders death a constitutionally impermissible penalty. Both Panetti's and his *amici*'s proposed standards, which require that a convict "rationally understand" the reasons for his execution, are fundamentally flawed. Given the inherent subjectivity and manipulability of such a standard, capital murderers could as a routine matter claim a lack of "rational understanding" through malingering or refusing to cooperate with experts. Moreover, such a requirement – imported from the Court's Fifth and Sixth Amendment jurisprudence concerning defendants' strategic participation at the guilt and sentencing phases – is out of place at the moment of execution. Finally, the retributive and deterrent interests served by the death penalty – focused primarily as they are on society at large rather than the capital murderer – do not demand the "rational understanding" that Panetti urges.

The Court should instead adopt a clear and objective test for execution competence. Specifically, the Court should hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. This standard controls for the malingering or uncooperative convict, is appropriately tailored to the execution stage of capital proceedings, and serves the twin goals of retribution and deterrence that justify capital punishment. Applying this standard, the Court should hold that Panetti is competent to be executed.

## ARGUMENT

### I. The State Court's Determination That Panetti Is Competent To Be Executed Is Entitled to AEDPA Deference.

Contrary to the district court's conclusion, JA 359-61, the state court's adjudication of Panetti's competence claim, JA 99-100, is entitled to deference under the AEDPA because it was neither contrary to, nor involved an unreasonable application of, clearly established federal due-process law as set out by this Court in *Ford*. This deference provides an alternative basis on which the Court should affirm the court of appeals's judgment that Panetti is not entitled to federal habeas relief.[5] See JA 376 & n.1.

Like Panetti's claim, the execution-competence claim in *Ford* arose from a federal habeas appeal. 477 U.S., at 404-05. Under the federal habeas statute in effect at the time, deference was afforded to factual determinations made by the state court unless the petitioner established one of the enumerated exceptions, one of which was whether the state proceedings provided a "full and fair hearing." 477 U.S., at 411 (plurality op.); *id.*, at 423

[5] The State raised the AEDPA-deference issue in the district court, JA 359, the court of appeals, JA 376, and in its brief in opposition to certiorari in this Court, Br. Opp. Cert. 7-9.

(Powell, J., concurring in the judgment); see also 28 U.S.C. §2254(d)(2) (1984). Ultimately, a majority of the Court concluded that deference was not appropriate because the state procedure for determining execution competence was found to be inadequate. *Ford*, 477 U.S., at 416 (plurality op.); *id.*, at 423 (Powell, J., concurring in the judgment).

The federal habeas statute has been amended since *Ford* was decided. Under the AEDPA, a federal habeas writ "shall not be granted" with respect to a state-court judgment unless that adjudication:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d).

As a statutory matter, the AEDPA – unlike the prior version of §2254(d) – contains no requirement of a "full and fair hearing" before deference is required. See *Valdez* v. *Cockrell*, 274 F.3d 941, 946 (CA5 2001); JA 376, n.1. Nevertheless, because it believed that *Ford* required, as a *constitutional* matter, a full evidentiary hearing in state court, the district court appears to have held §2254(d) of the AEDPA to be unconstitutional as applied in this case.[6] JA 130-33, 361. That holding was in error.

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[6] The district court's reasoning on this question is somewhat oblique and is potentially subject to an alternative interpretation, which Panetti advances, Panetti Br. 4, n.3, that the court merely found the state court's failure to conduct a full evidentiary hearing to be "an unreasonable application of . . . clearly established federal law" under §2254(d). Either way, the district court's failure to accord AEDPA deference to the state court's competence finding was erroneous for the same reason – that *Ford* compels no such conclusion.

### A. *Ford* Requires Only Minimal Process for Deference To Be Afforded to the State Court's Competence Determination.

Echoing the district court's analysis, JA 359-61, Panetti's sole argument that AEDPA deference does not apply is that the state court disregarded *Ford*'s holding establishing the minimum procedural due process requirements in assessing execution competence, Panetti Br. 4, n.3.[7] Because the state court's procedures fully comported with the minimum protections outlined in *Ford*, its judgment was entitled to statutory deference.

In concluding that the state competence determination in *Ford* was not entitled to deference, the Court established that the Constitution guarantees certain due-process rights to habeas petitioners challenging their competence to be executed. 477 U.S., at 411-16 (plurality op.); *id.*, at 423-27 (Powell, J., concurring in the judgment). But because no majority of the *Ford* Court agreed on what

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[7] Panetti does not raise an AEDPA challenge to the state court's application of the legal standard for execution competence, and with good reason: there was (and is) no "clearly established federal law as determined by the Supreme Court of the United States" on that point. Justice Powell noted in his *Ford* concurrence that the plurality opinion did not address the "meaning of insanity." 477 U.S., at 418 (Powell, J., concurring in the judgment). Later, Justice Marshall, the author of the *Ford* plurality opinion, confirmed that *Ford* did not establish a test for execution competence. *Rector* v. *Bryant*, 501 U.S. 1239, 1241 (1991) (Marshall, J., dissenting from denial of cert.). Although the Court has subsequently acknowledged Justice Powell's proffered test as the appropriate standard in dicta, see *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), that reference does not constitute "clearly established law" under the AEDPA. See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) ("That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.").

And to the extent that the state court's competence ruling encompasses factual determinations, Panetti likewise does not raise an AEDPA challenge to the reasonableness of those determinations under §2254(d)(2). Accordingly, those facts must be presumed correct. 28 U.S.C. §2254(e)(1).

specific type or amount of process is due, Justice Powell's opinion concurring in the judgment – the opinion that states the narrowest ground for the Court's due-process holding – controls. *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

Justice Powell rejected any notion that a full-scale "sanity trial" was constitutionally required:

> "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have *substantial leeway* to determine what process best balances the various interests at stake." *Ford*, 477 U.S., at 427 (Powell, J., concurring in the judgment) (emphasis added).

Thus, as long as at least this level of process was provided, former §2254(d)'s presumption of correctness applied. And given the "substantial leeway" that state courts are expressly given under *Ford*, the AEDPA today requires even greater deference to the state court's case-by-case application of it. *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway [under the AEDPA that] courts have in reaching outcomes in case-by-case determinations.").

### B. The State Court's Procedures Easily Satisfied *Ford*'s Minimal Due-Process Requirements.

The *Ford* plurality identified three principal failings with Florida's procedure: (1) that it denied the prisoner the opportunity be heard – specifically an opportunity to submit "any material relevant to the ultimate decision;" (2) that it denied the prisoner "any opportunity to challenge or impeach the state-appointed psychiatrists;" and (3) that it placed the decision "wholly within the executive branch." *Ford*, 477 U.S., at 413-16 (plurality op.). Once those three failings are corrected, the plurality was

explicit: "We do *not here suggest that only a full trial on the issue of sanity will suffice* to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*, at 416 (plurality op.) (emphasis added). And Justice Powell's controlling concurrence was even more emphatic, expressly noting that state procedures "*far less formal* than a trial" would suffice. *Id.*, at 427 (Powell, J., concurring in the judgment) (emphasis added).

The procedures employed by the state court satisfy all three requirements of *Ford*. First, unlike Ford – who was not "included in the truth seeking process," *id.*, at 413 (plurality op.) – Panetti was provided with ample opportunity to be heard. Florida prohibited consideration of any materials submitted by Ford, *ibid.*; Panetti, in contrast, was statutorily entitled to submit any "affidavits, records, or other evidence" supporting his allegation of incompetence, Tex. Code Crim. Proc. art. 46.05(c); JA 59, and he did in fact submit such materials, JA 102, 108-12.

Second, unlike Ford – who was denied "any opportunity to challenge or impeach the state-appointed psychiatrists," *Ford*, 477 U.S., at 415 (plurality op.) – Panetti was expressly invited by the Court to submit any objections or challenges to the court-appointed psychiatrists, JA 77-78, and he did in fact submit such objections and challenges, JA 79-98.

Third, and most importantly, unlike Ford – whose competence proceedings were "wholly within the executive branch," *Ford*, 477 U.S., at 416 (plurality op.) – Panetti had his competence challenge adjudicated by an impartial court of law. Tex. Code Crim. Proc. art. 46.05(b). This is in stark contrast to *Ford*, which considered the executive-branch nature of the proceedings to be "[p]erhaps the most striking defect in the [Florida] procedures." 477 U.S., at 416 (plurality op.); see also *id.*, at 427 (Powell, J., concurring in the judgment).

Nonetheless, Panetti complains that the state court denied his requests for "adversarial proceedings by which he could contest the court-appointed experts' opinions."

Panetti Br. 4, n.3. But nothing in Justice Powell's controlling *Ford* concurrence suggests that a live adversarial hearing is necessary to satisfy due-process requirements in this context. Indeed, Justice Powell expressly observed to the contrary that "ordinary procedures – complete with live testimony, cross-examination, and oral argument by counsel – are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Ford*, 477 U.S., at 426 (Powell, J., concurring in the judgment).

Additionally, Panetti argues that the state court erroneously decided his competence claim without appointing a psychiatric expert for him. Panetti Br. 4-5, n.3. This argument is likewise unavailing. Although Justice Powell's opinion stated that due process requires that the court *accept* any evidence from petitioner's counsel, "including psychiatric evidence that may differ from the State's own psychiatric examination," see *Ford*, 477 U.S., at 427 (Powell, J., concurring in the judgment), nothing in *Ford* gave Panetti a constitutional right to the appointment of his own expert at state expense. And, unlike in *Ford*, neither Dr. Parker nor Dr. Anderson was *the State's* expert. Rather, each was a neutral mental-health expert appointed by the state court. JA 59-60; see Tex. Code Crim. Proc. art. 46.05(f).

In any event, Panetti did in fact submit his own expert psychiatric evidence to the state court. Specifically, Panetti presented the report of Dr. Mark Cunningham in his second motion to determine competence under Texas Code of Criminal Procedure Article 46.05, JA 102, 108-10, which in turn prompted the state court to appoint its own experts to evaluate Panetti, JA 59. After Drs. Parker and Anderson submitted their report, the court invited Panetti to respond. JA 77-78. In his detailed submission, JA 79-98, Panetti relied on the Cunningham report to challenge Drs. Parker and Anderson's conclusions, JA 94-95.

Under any measure, the state-court proceedings satisfied the strictures of *Ford*. Therefore, §2254(d), as applied, is not unconstitutional. And because the procedures were consistent with *Ford*, the state court's

adjudication likewise did not contradict or unreasonably apply "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d). Accordingly, the state court's determination that Panetti is competent to be executed statutorily bars his request for federal habeas relief.

## II. Even If AEDPA Deference Does Not Apply, Panetti's Execution Does Not Violate the Eighth Amendment.

Only if the Court concludes that the AEDPA does not bar habeas review should it reach Panetti's claim that the court of appeals employed the wrong legal standard for execution competence. Although *Ford* held that the Eighth Amendment proscribes execution of the "insane," 477 U.S., at 409-10, the Court did not define "insanity" or otherwise delineate the constitutional threshold of competence to be executed, *id.*, at 418 (Powell, J., concurring in the judgment), a question which remains unresolved.

Before turning to the merits of that claim, two issues bear emphasis. **First**, there is no dispute that, under *Ford*, executing the insane violates the Eighth Amendment. Executing the insane was forbidden at common law, and it is forbidden today. Although Panetti and his *amici* endeavor to frame this case as the final and most important installment in the soon-to-be *Atkins-Roper* trilogy, that book has already been written – in *Ford*. And **second**, there is no dispute that, like many capital defendants, Panetti suffers from some degree of mental illness. Panetti devotes considerable energy to demonstrating this undisputed fact, while never confronting the fact findings made by the state and federal district courts and the unbroken line of judicial determinations of his competence.

The only legal question before the Court on the merits of this case is what is the definition of "insanity" – that is, what must a court find to conclude that a capital murderer is constitutionally incompetent to be executed.

In determining whether the Eighth Amendment bars a particular punishment as "cruel and unusual," the Court has followed a well-established analytical path. First, the Court examines whether the punishment was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Ford*, 477 U.S., at 405; see also *Solem* v. *Helm*, 463 U.S. 277, 285-86 (1983). Second, the Court considers whether the punishment is deemed cruel and unusual according to modern "standards of decency." *Roper* v. *Simmons*, 543 U.S. 551, 560-61 (2005) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality op.)). Those standards derive principally from "objective evidence of contemporary values," the "clearest and most reliable" of which is "the legislation enacted by the country's legislatures." *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) (citation and quotation marks omitted). Finally, the Court applies its "independent judgment" to evaluate "the acceptability of a particular punishment under the Eighth Amendment." *Roper*, 543 U.S., at 563-64. In capital cases, the Court has made this assessment primarily by reference to "the penological justifications for the death penalty." See *id.*, at 571; *Atkins*, 536 U.S., at 317.

This three-part analysis does not support Panetti's contention that, under the Eighth Amendment, a capital convict must "rationally understand" the reasons for his execution before it may proceed. Although execution of the "insane" was deemed cruel and unusual in 1791, *Ford*, 477 U.S., at 406-08, the common law did not then draw fine distinctions in mental ability, and thus did not delineate any precise competence standard. Consequently, the standards of the common law are, at best, inconclusive. Likewise, a survey of modern state legislation offers indefinite guidance, as it yields no consensus at all on the mental faculty a capital murderer must possess at the time of his execution. Finally, in the exercise of its independent judgment, the Court should reject the proposition that a capital convict must possess a "rational understanding" of the reasons for his execution to render death an acceptable punishment under the Eighth Amendment.

Such a standard is not tailored to the particular interests at stake in the post-sentencing phase of capital proceedings, invites malingering and abuse, and is not necessary to advance the retributive and deterrent justifications for the death penalty.

For all of these reasons, the Court should reject Panetti's and his *amici*'s proposed execution-competence standards. It should instead hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. Under this standard, Panetti is competent to be executed.

### A. The General Rule Against Executing the Insane in 1791 Does Not Illuminate the Specific Level of Understanding That Defines the Eighth Amendment Floor.

"[T]he Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791. *Id.*, at 405. It is now settled that this category included execution of the "insane." *Id.*, at 406-08. Thus, the relevant historical inquiry is what degree of mental incapacity qualified as "insanity" and triggered the ban, or, conversely, what level of understanding a capital convict then had to possess to be eligible for execution.

As *amici* Legal Historians explain, the law of that time "reveals no precise definitions or uniform standards used . . . to determine mental competency." Legal Historians Br. 4. For that reason, *no* contemporary competence metric defined as a specific consciousness level – including the court of appeals's "awareness" standard *and* Panetti's proposed "rational understanding" test – can claim any eighteenth-century pedigree. Because the Court's task here *is* to prescribe the grade of understanding that marks the constitutional threshold, the historical prong of the Eighth Amendment inquiry is ultimately unhelpful.

Nevertheless, the historians believe that they can divine enough of the ancient meaning of insanity to conclude that a court in the Framers' era would have spared Panetti from his sentence. Panetti and the historians also infer from rationales for the ban on executing the insane that it protected all who did not "rationally understand" the reasons for their execution. The Court should reject this speculation. Whether Panetti's delusional behavior would have earned him a reprieve from execution in 1791 is, at best, indeterminate. And whatever one may infer in hindsight from commentators' justifications for insulating the "insane" from capital punishment, such inferences still do not confirm any discernible scale of mental awareness that eighteenth-century judges and juries actually applied in assessing execution competence.

### 1. Eighteenth-century courts did not employ a competence standard that corresponds to any particular level of understanding defined today.

The State agrees with *amici* Legal Historians that the Eighth Amendment incorporates "at least those protections from punishment the common law afforded English subjects" at the time it was adopted, Legal Historians Br. 7, and thus that late eighteenth-century English precedents and practice are the primary sources of information about the Amendment's original scope. The State further agrees that these sources "did not bequeath definitive standards to determine competence for execution." *Id.*, at 21.[8]

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[8] Indeed, this was true of competence at any stage of criminal proceedings, as "there were simply no clear, accessible definitions of derangement judges could include in their instructions to a jury that might indicate what 'threshold level' might preclude criminal responsibility." Joel Peter Eigen, Witnessing Insanity: Madness and Mad Doctors in the English Court 38 (1995); see also Joel Peter Eigen, Unconscious Crime: Mental Absence and Criminal Responsibility in Victorian London 24 (2003).

To the extent the common law did draw any distinctions in competence levels for criminal proceedings, it was only between "total insanity" and "partial insanity." Only the former provided a basis for acquittal or a reprieve from execution. Eigen, Unconscious Crime, *supra*, at 40 (noting that, prior to 1800, "criminal law recognized only a *total* want of understanding and memory – *a total insanity* – as grounds for acquittal"); 1 Matthew Hale, The History of the Pleas of the Crown 30 (1736) (observing that "partial insanity seems not to excuse them in the committing of any offence for its matter capital"). Even then, Hale acknowledged that "it is very difficult to define the indivisible line that divides perfect and partial sanity" and explained that ultimately the judge and jury must make that determination based on the particular circumstances of the case. 1 Hale, *supra*, at 30; see also 4 William Blackstone, Commentaries on the Laws of England 25 (1st English ed. 1769) ("But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury.").

In this endeavor, courts of that era could not avail themselves of "the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry." Legal Historians Br. 16. Indeed, doctors seldom even participated in competence assessments. Eigen, Witnessing Insanity, *supra*, at 42 (noting that "medical men were *rarely* present [in criminal proceedings] throughout the late 1700s"). "Usually it was not medical evidence but the testimony of relatives, friends, or spectators that persuaded the court that the defendant had been mad . . . ." Nigel Walker, The Insanity Defense Before 1800, 477 Annals Am. Acad. Pol. & Soc. Sci. 25, 30 (1985).

Given the indefinite insanity criteria of eighteenth-century English practice, the historians urge that the relatively strict competence standard applied by the court of appeals – requiring that Panetti simply be "aware" of his impending execution and the State's reasons for it – finds no support in the common law in 1791. Legal Historians Br. 19. That may well be the case.

But for the very same reason that the court of appeals's "awareness" test was unknown in 1791, so too was Panetti's proposed "rational understanding" test. Just as English courts "did not draw the fine lines the Fifth Circuit did," *ibid.*, neither did they draw the equally-specific line that Panetti proposes. The vague formulations employed by eighteenth-century courts, lacking a clear taxonomy and uninformed by expert analysis, do not translate to *any* of the specific competence standards known to modern jurisprudence. Consequently, this first stage of the Eighth Amendment inquiry does not define the threshold level of execution competence.

### 2. The Court should reject *amici* Legal Historians' speculation that Panetti would not have been executed under eighteenth-century standards.

Although the historians acknowledge that the Framers would have found their era's competence standards "imprecise or even amorphous," they nonetheless conclude that "the law as generally understood then would not have allowed the execution of a mentally ill and delusional defendant like Mr. Panetti." Legal Historians Br. 22. This assertion appears to rest on two interpretations they suggest concerning the eighteenth-century standard for execution competence: (1) that it was more lenient than the standard for trial fitness; and (2) that it approximated the understanding of a fourteen-year-old child. *Id.*, at 14-16, 18-19. Neither proffered interpretation is well founded.

#### a. The standard for execution competence in 1791 was not discernibly lower than that for competence to stand trial.

Because the common law dictated that a person could be adjudged insane and spared execution even when he had previously been found competent to stand trial, the historians deduce that either (1) the common law accounted for

mental deterioration between conviction and execution or (2) execution competence was a lower standard than trial fitness. *Id.*, at 14-15. They settle on the latter explanation, *id.*, at 15, but for dubious reasons.

First, the historians speculate that it would have been uncommon for a convict's mental state to deteriorate during the relatively short interval between conviction and execution. However infrequent, though, such lapses – rather than application of a lower competence standard – were in fact the explicit basis of the common-law rule allowing reassessment of sanity before execution: "[I]f, *after judgment, he becomes of nonsane memory*, execution shall be stayed." 4 Blackstone, *supra*, at 24 (emphasis added); see also 1 Hale, *supra*, at 35 (same). Second, the historians note that it was within the discretion of the court or king to assess a convict's execution competence. Legal Historians Br. 15. Even so, Blackstone and Hale agree that the assessment itself was generally left to a jury, 4 Blackstone, *supra*, at 25; 1 Hale, *supra*, at 35, and they do not suggest that jurors used any different test for insanity in this regard. Third, the historians reason that an execution reprieve, which could be temporary, logically demanded a lower standard than did a trial, in which "resolution of the defendant's criminal responsibility" was at stake. Legal Historians Br. 15. That supposition has no eighteenth-century basis and ignores the strong interest in carrying out a valid sentence.

In any event, the historians' interpretation is refuted by the plain text of Hale's and Blackstone's lengthy discourses on the law of insanity, neither of which draws any distinction at all between the standards for trial fitness and execution competence. 1 Hale, *supra*, at 35 (explaining that "if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried . . . or, if after judgment he becomes of *non sane memory*, his execution shall be spared"); 4 Blackstone, *supra*, at 388-89 (applying term *non compos* to describe basis for exempting defendant from further proceedings at *all* stages of capital cases). Surely if execution competence required a different

test, these venerable authorities would have noted it in these pertinent sections of their texts.

### b. Hale's fourteen-year-old standard provides no basis to conclude that a court would have stayed Panetti's execution in 1791.

Relying on Hale and other commentators, the historians also argue that "the level of understanding required to meet the more forgiving standard of fitness for execution was at least that of a child less than 14 years old." Legal Historians Br. 19.[9] Conceding that this test is "indefinite," they nonetheless argue that "it does not support the Fifth Circuit's approach." *Ibid.* But as with other competence definitions of the time, it is too vague to support *any* particular metric of understanding.

First, one can only speculate how the Framers would have ranked the mental capacity of a fourteen-year-old. But more importantly, Hale's age-based criterion was not the definitive eighteenth-century standard. Blackstone, writing in 1769, observed that the legal capacity of children themselves no longer hewed strictly to age groupings in capital cases. 4 Blackstone, *supra*, at 23 ("[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen . . ."). He then describes the execution of several children between ages eight and thirteen under this standard. *Id.*, at 23-24.

And to the extent that Hale's formulation still had any currency in 1791, the historians admit that its application

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[9] The historians' implications that Hale's 14-year-old standard was specifically tailored for "fitness for execution" and was somehow "more forgiving" than the competence test applied at other stages are incorrect. Hale expressly discussed this standard as applying to all phases of capital proceedings. 1 Hale, *supra*, at 30.

"appears, if anything, to have been *more indefinite*." Legal Historians Br. 19 (emphasis added). Consequently, the fourteen-year-old standard is of negligible utility in assessing whether an eighteenth-century judge or jury would have found Panetti competent to be executed.

**c. Panetti's claimed delusional behavior would not necessarily have exempted him from execution in 1791.**

It is at the very least doubtful whether the specific mental infirmity at the heart of Panetti's claim – his delusion of religious persecution, Panetti Br. 28 – would have earned him a reprieve from execution in 1791. As one commentator notes, "delusions" were not introduced as an insanity defense until the trial of James Hadfield for the attempted assassination of King George III in 1800, nine years after the Eighth Amendment's adoption. Eigen, Witnessing Insanity, *supra*, at 49-51. And even Hadfield's acquittal "did not inaugurate delusion's 'career' as a regular feature of the insanity defense." *Id.*, at 51. Indeed, "[i]t was another twelve years before delusion was introduced into testimony at the Old Bailey by a medical witness." *Ibid.*

Another commentator confirms that Hale's "perfect insanity" and fourteen-year-old measures did not encompass delusional behavior as we understand it today:

> "In the time of this eminent jurist insanity was a much less frequent disease than it now is, and the popular notions concerning it were derived from the observation of those wretched inmates of the mad-houses . . . . Those nice shades of the disease, in which the mind, without being wholly driven from its propriety, pertinaciously clings to some absurd delusion, were either regarded as something very different from real madness, or were too few, too far removed from the common gaze, and too soon converted by bad management into the more active forms of the disease to enter much into the general idea

> entertained of madness." Isaac Ray, A Treatise on the Medical Jurisprudence of Insanity 21 (1962).

Accordingly, although eighteenth-century precedents may yield limited examples of persons adjudged "insane" who exhibited delusional behavior, the relevant commentaries call into question the notion that such persons would generally have been spared from capital sentences.

### 3. The Court cannot reliably derive the precise scope of the ban on executing the insane in 1791 from rationales advanced to justify the ban.

The Legal Historians invite the Court to divine the precise level of understanding contemplated by the eighteenth-century ban on executing the "insane" by drawing inferences from various suggested rationales for the prohibition. Legal Historians Br. 22; see also Panetti Br. 37-40. Such an approach is fraught with uncertainty, particularly when the rationales "do not provide a common answer." *Ford*, 477 U.S., at 419 (Powell, J., concurring in the judgment).

If the contours of the ban hinged on the ability of the convict to seek clemency or on the inhumanity of executing the severely mentally ill, one has to question the extent to which those reasons actually influenced the administration of capital punishment by courts that also sentenced eight- and ten-year-old children to be hanged. See 4 Blackstone, *supra*, at 23-24. If the prohibition reflected the view that mental illness is its own punishment, see *id.*, at 389, the application would have depended entirely on the jury's assessment of whether the convict's particular illness was a sufficient penalty for his capital crime. If the idea was to spare those who could not prepare for their deaths, Justice Powell believed that to be satisfied so long as the defendant is "aware that his death is approaching," *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment), which Panetti has been found to be, JA 372.

And although some believed that execution of the insane would not deter sane persons, others at the time clearly disagreed.[10]

### B. Contemporary State Legislation Does Not Yield a National Consensus on the Threshold Level of Execution Competence.

In addition to forbidding punishment that was considered cruel and unusual in 1791, the Eighth Amendment also prohibits modes of punishment that are inconsistent with "evolving standards of decency that mark the progress of a maturing society." *Ford*, 477 U.S., at 406 (citation omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S., at 312 (citation omitted). A survey of this legislation does not support Panetti's claim that a national consensus places the threshold of execution competence at "rational understanding." Panetti Br. 40. Rather, it reveals that no discernible consensus currently exists on this question.

As Panetti notes, of the thirty-eight States that authorize capital punishment, half do not have *any* statutory definition of execution competence. *Ibid.* By itself, this statistic undermines the notion that there is any sort of national "standard" on the requisite level of understanding. Because those States' citizens have yet to weigh in on this issue, it is impossible to know how they would define competence in this context.[11]

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[10] Compare Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 6 (1797) (citing lack of deterrent effect), with John Hawles, Remarks on the Trial of Charles Bateman 476, in 11 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors (1811) (disagreeing with Coke because "the terror to the living is equal, whether the person [executed] be mad or in his senses").

[11] Panetti rightly does not suggest that the lack of a death-penalty statute in the remaining twelve States bears in any way on whether a

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Furthermore, the state legislatures that *have* addressed the issue do not agree upon a standard. Texas classifies as incompetent for execution a convict who "does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed." Tex. Code Crim. Proc. art. 46.05(h). But this statute does not require the "rational understanding" that Panetti urges, and indeed, Panetti was adjudged competent to be executed under Article 46.05. JA 99. Four other States mimic the court of appeals's test, requiring only that the convict be "aware" that he will be put to death for a capital crime.[12]

The remaining fourteen States define execution competence in terms of the convict's *capacity* to understand or know his sentence and the reasons for it.[13] Like

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consensus exists for purposes of execution competence. Although the *Roper* Court found it appropriate to count those States in tallying the jurisdictions that barred execution of juvenile offenders, 543 U.S., at 574, the present analysis demands a different calculus. Although a State's wholesale rejection of the death penalty may subsume its view as to *whether* a particular category of offenders may be executed, it does not speak to the distinct issue of *when* a person presumed competent and eligible for his capital sentence may nonetheless be deemed incompetent to proceed with the execution. See *Ford*, 477 U.S., at 425 (Powell, J., concurring in the judgment) (noting that in execution-competence context, "the only question raised is not *whether*, but *when*, [the] execution may take place").

[12] Ariz. Rev. Stat. Ann. §13-4021(B); Colo. Rev. Stat. §18-1.3-1401(2); Md. Code Ann., Corr. Servs. §3-904(a)(2); Utah Code Ann. §77-19-201. Panetti mistakenly omits Utah from this group. Panetti Br. 40-41 & n.25. Panetti also incorrectly posits that these statutes "implicitly" embrace what Panetti inaccurately labels a "rational understanding" requirement. *Ibid.*; see *infra* Part II.C.2. The word "awareness" alone certainly does not imply the robust appreciation that Panetti mislabels "rational understanding."

[13] Florida, Idaho, Missouri, Montana, New York, Ohio, and Wyoming use the words "capacity" or "capable." Fla. Stat. §922.07(3); Idaho Code Ann. §18-210; Mo. Ann. Stat. §552.060(1); Mont. Code Ann. §46-14-103; N.Y. Correct. Law §656(1); Ohio Rev. Code Ann. §2949.28(A); Wyo. Stat. Ann. §7-13-901(a)(v). Georgia, Kentucky, North Carolina, and Oregon use the term "ability." Ga. Code Ann. §17-10-60; Ky. Rev. Stat. Ann.

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Texas's statute, most of these provisions are ambiguous with respect to the type of "understanding" that is the focus of the capacity inquiry. Only four contain language that arguably requires, or has been interpreted to require, the "rational understanding" showing that Panetti proposes.[14] Georgia directs that the convict be able "to know" why he is being executed and the nature of the punishment, Ga. Code Ann. §17-10-60, which implies simply an awareness of the reasons for his impending death. The other nine use the term "understand" without qualification,[15] leaving it unclear whether those statutes require for competence to be executed "factual understanding" or "rational understanding" – a distinction that has been a feature of competence-to-stand-trial jurisprudence at least

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§431.213; N.C. Gen. Stat. §15A-1001; Or. Rev. Stat. §137.463(6)(a). Arkansas and Louisiana use "competence" to understand. Ark. Code Ann. §16-90-506(d)(1)(B); La. Rev. Stat. Ann. §15:567.1(B). Finally, Mississippi uses the phrase "sufficient intelligence." Miss. Code Ann. §99-19-57(2)(b). As the district court observed, assessing a convict's *capacity* to understand is not the same as assessing whether he in fact actually understands. JA 364-65; see *infra* Part II.C.3.

[14] See *Provenzano* v. *State*, 750 So. 2d 597, 602 (Fla. 1999) (*per curiam*) (holding that Florida's execution-competence provision "contains a rationality element, albeit a limited one"); *Billiot* v. *State*, 655 So. 2d 1, 15 (Miss. 1995) (suggesting that Mississippi's execution-competence statute contemplates whether the convict has "a rational understanding of what it means to be executed" and "the ability to rationally connect his crime with the fact that he will be executed"); N.C. Gen. Stat. §15A-1001 (requiring as element of competence for any punishment that convict be able "to comprehend his own situation in reference to the proceedings"); Or. Rev. Stat. §137.463(6)(a) (requiring that capital convict be "able to comprehend the reasons for the sentence of death and its implications").

[15] Ark. Code Ann. §16-90-506(d)(1)(B); Idaho Code Ann. §18-210; Ky. Rev. Stat. Ann. §431.213; La. Rev. Stat. Ann. §15:567.1(B); Mo. Ann. Stat. §552.060(1); Mont. Code Ann. §46-14-103; N.Y. Correct. Law §656(1); Ohio Rev. Code Ann. §2949.28(A); Wyo. Stat. Ann. §7-13-901(a)(v).

since the Court handed down *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (*per curiam*).[16]

Thus, the States whose legislatures have defined execution competence make up a fractured lot. Although a majority emphasizes the convict's capacity, neither a majority view, nor even a clear plurality view, emerges about what level of understanding a capital murderer must have the capacity to possess. Even the fourteen States that look to convicts' capacity still represent only 37 percent of the jurisdictions that authorize capital punishment. And of those fourteen, only four arguably embrace some form of what Panetti would term "rational understanding," and even they focus on capacity, rather than an actual demonstration of specific understanding. Those four jurisdictions constitute only 10.5 percent of death-penalty States, far less than a consensus by any measure. Indeed, an equal number adopt a variant of the court of appeals's "awareness" test that Panetti challenges. Thus, at least at the current time, the varied approaches of the several state legislatures yield no objective consensus from which the Court can divine any national standard reflecting contemporary values on execution competence.[17]

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[16] Panetti includes in his accounting judicial decisions from five States with no statutory definition of execution competence. Panetti Br. 41-42 & n.30. The Court should reject this attempted expansion of the Eighth Amendment inquiry for two reasons. First, because the point of this survey is to assess "contemporary values," the Court has focused principally on "the legislation enacted by the country's legislatures," *Atkins*, 536 U.S., at 312 (citation omitted), which presumably reflects the mores of the electorate. By contrast, judicial opinions cannot claim the same representative quality. Second, only three of these decisions purport to express *state* law, and they each differ in substance. *Bingham* v. *State*, 169 P.2d 311, 314 (Okla. Crim. App. 1946); *Singleton* v. *State*, 437 S.E.2d 53, 58 (S.C. 1993); *Van Tran* v. *State*, 6 S.W.3d 257, 265-66 (Tenn. 1999). The remaining two address the federal constitutional standard. *Baird* v. *State*, 833 N.E.2d 28, 29 (Ind. 2005); *Commonwealth* v. *Jermyn*, 652 A.2d 821, 822 (Pa. 1995).

[17] Panetti further relies on professional opinion to support his view that "rational understanding" should be the constitutional standard. Panetti Br. 42-43. This reliance is misplaced. In *Atkins*, the Court

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### C. The Court Should Hold That the Appropriate Constitutional Standard for Competence To Be Executed Is Whether a Defendant Has the Capacity To Recognize That His Punishment Is the Result of His Being Convicted of Capital Murder and Will Cause His Death.

Because the foregoing historical and contemporary surveys yield no clear standard for execution competence under the Eighth Amendment, the Court's typical past practice would be to apply its "own independent judgment" to define the level of mental incapacity that renders death a constitutionally impermissible penalty. See *Roper*, 543 U.S., at 564. Both Panetti's and his *amici*'s proposed execution-competence standards are deeply flawed. The State urges the Court to reject those proposals and instead adopt a clearer and more objective test. Specifically, the Court should hold that a mentally ill capital convict is incompetent to be executed only if, because of his illness, he lacks the *capacity* to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death.

The State's proposed standard – derived from *Ford* and the Court's Eighth Amendment jurisprudence – prevents the execution of the truly incompetent, while at the same time (1) incorporating essential safeguards

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looked to professional opinion, religious opinion, international consensus, and polling data only *after* it had found a state-law consensus against executing the mentally retarded. See 536 U.S., at 316, n.21.

Even if there were such a consensus, the additional evidence that Panetti cites is sparse in comparison to that adduced in *Atkins*. Cf. *ibid.* Panetti, for example, proffers no evidence of any international consensus, perhaps because no other country has yet addressed the specific question before the Court. And when the United Nations addressed the question, it declined to opine at all as to the substantive standard that should be employed. See Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Supp. No. 1, at 33, U.N. Doc. E/1984/92 (1984) (setting a prohibition on execution of "persons who have become insane" but not defining insanity).

against malingering and noncooperation with psychological examiners, (2) being specifically tailored to the post-sentencing phase of capital proceedings, and (3) effectively advancing the modern penological interests behind the death penalty.

**1. Because of the inherent uncertainties and subjectivity of psychiatric testing, and the risks of malingering and abuse, any standard for competence to be executed should be rigorous and clear.**

Panetti and his *amici* endeavor to frame this case as a natural extension of *Atkins* and *Roper*. But mental illness differs from mental retardation and age in several material respects. Unlike age and mental retardation, severe mental illness is (1) subject to conflicting diagnoses, (2) given to subjectivity, (3) mutable over time, and (4) in some instances, within the ability of the individual to ameliorate or exacerbate, by voluntarily taking – or ceasing to take – medications that may help control the illness. Each of these distinctions renders incompetence to be executed far more susceptible to malingering or abuse than is either age or mental retardation.

The Court has often noted the difficulties that attend even the most skilled psychiatric diagnoses. "[P]sychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms." *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985). For that reason, "a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess however conscientious.'" *Ford*, 477 U.S., at 412 (plurality op.) (quoting *Solesbee* v. *Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). As Justice Powell explained,

> "Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. And unlike a determination of whether the death penalty is appropriate in a

> particular case, the competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'" *Id.*, at 426 (Powell, J., concurring in the judgment) (quoting *Addington* v. *Texas*, 441 U.S. 418, 430 (1979)) (citations omitted).

Just last Term, the Court observed that the medical definitions of mental illness "are subject to flux and disagreement," and that such diagnoses "may mask vigorous debate within the profession about the very contours of the mental disease itself." *Clark* v. *Arizona*, 126 S.Ct. 2709, 2722, 2734 (2006). "[T]he consequence of this professional ferment," the Court noted, "is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct." *Id.*, at 2734.

Not only are psychiatric diagnoses subjective and frequently conflicting, they are by their nature subject to change. *Atkins* and *Roper* were predicated on constant variables: if a defendant is fifteen or seventeen or twenty at the time of the crime, that age at that instant is fixed and unchanging; likewise, if an individual is of normal intelligence throughout his or her life, that person cannot be expected later to become mentally retarded. In contrast, if a person is sane yesterday and today, that does not mean he or she will be sane tomorrow.

As Justice O'Connor cautioned in *Ford*, that mutability carries with it serious risks of malingering:

> "[T]he *potential for false claims and deliberate delay* in this context is *obviously enormous*. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." 477 U.S., at 429 (O'Connor, J., concurring in part

and dissenting in part) (citations omitted) (first two emphases added).[18]

Finally, unlike with age or retardation, capital murderers facing execution may have some ability to voluntarily choose to render themselves incompetent to be executed simply by ceasing to take their medication. Indeed, in the case at bar, the evidence indicates that Panetti's medication had been largely successful in controlling his mental illness, Federal Petition Ex. 14, at 462-63, but that he willingly chose to stop taking it, *id.*, at 431, 436; 3.CR.360.

### 2. Panetti's proposed "rational understanding" standard has no basis in the Court's precedent and would invite abuse.

The Court has recognized that "a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." *Drope*, 420 U.S., at 176. Accordingly, legal competence evaluations must be specifically tailored to the stage of proceedings at which they apply. See *Rees* v. *Peyton*, 384 U.S. 312, 314 (1966) (*per curiam*).

As Justice Powell accurately noted in *Ford*, an "Eighth Amendment [incompetence to be executed] claim can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death." 477 U.S., at 425 (Powell, J., concurring in the judgment). Thus, the relevant inquiry is merely *when*, and not *whether*, a valid death sentence may be carried out. *Id.*, at 425 & n.5; see Panetti Br. 47 (recognizing that "an offender's execution can proceed if he regains his sanity"). Because the "rational understanding" test that Panetti and the APA urge addresses concerns that are absent in the post-sentencing

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[18] In so noting, Justice O'Connor echoed the concerns of Hale, who, some three centuries earlier, likewise urged courts to guard against the potential for "great fraud" concerning those claiming incompetence. 1 Hale, *supra*, at 35; Legal Historians Br. 15, n.8.

phase of capital proceedings, the Court should decline to adopt it.

**a. A "rational understanding" inquiry would engraft Fifth and Sixth Amendment concerns on an Eighth Amendment test.**

Although Panetti uses the phrase loosely, "rational understanding" is a specific term of art; it describes the core of several pre-sentencing competence tests. "Rational understanding" was introduced in *Dusky*, in which the Court defined the test for competence to stand trial as whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." 362 U.S., at 402 (quotation marks omitted); see also *Godinez* v. *Moran*, 509 U.S. 389, 398 (1993) (concluding that the "rational understanding" test should also be used to measure a defendant's competence to plead guilty and to waive the right to counsel).

In explaining the "rational-understanding" component of pre-sentencing competence determinations, the *Godinez* Court emphasized the "strategic choices" that criminal defendants must be capable of making for a court to find them competent to relinquish such significant trial rights as the Fifth Amendment's privilege against self-incrimination and the Sixth Amendment's rights to jury trial and confrontation of adverse witnesses. *Ibid.*; see *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). The Court went on to note additional strategic choices, including "whether (and how) to put on a defense and whether to raise one or more affirmative defenses," that a defendant who pleads not guilty will be called upon to make during the course of trial. *Godinez*, 509 U.S., at 398.

For all of these strategic choices, a "rational understanding" is necessary to ensure that defendants do not foolishly or mistakenly relinquish valuable constitutional rights. A defendant faced with such choices must be able to

"understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S., at 171.

But a capital convict, unlike a capital defendant, has substantially fewer rights, and there are no significant strategic choices left for him to make. See *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993) (explaining that the presumption of innocence disappears after conviction and listing numerous constitutional rights that defendants enjoy but that convicts do not); *Barefoot* v. *Estelle*, 463 U.S. 880, 887-88 (1983) (discussing the "secondary and limited" nature of federal habeas proceedings); see also *Ford*, 477 U.S., at 421 (Powell, J., concurring in the judgment) (noting that, because the Court's "decisions already recognize . . . that a defendant must be competent to stand trial, . . . the notion that a defendant must be able to assist in his defense is largely provided for"). Assuming that a convict is competent to be executed, only the remote possibilities of clemency or commutation – processes that call for no significant strategic decisions by a convict – can prevent the sentence from being carried out.

**b. Panetti's conception of "rational understanding" is far too expansive.**

Panetti's argument is, in fact, even more aggressive than one for inclusion of only a pure "rational understanding" component. Although he invokes that phrase throughout his brief, the substantive requirement that Panetti asks the Court to incorporate is actually a version of the heightened "knowing and voluntary" requirement that the Court has held applicable, over and above the "rational understanding" competence component, with respect to a defendant's decision to plead guilty or to waive his right to counsel. *Godinez*, 509 U.S., at 400-01 & n.12; *Faretta* v. *California*, 422 U.S. 806, 835 (1975).

As *Godinez* explained, "knowing and voluntary" is not part of any competence test; it is an additional safeguard designed to ensure not merely that a defendant has the *capacity* to understand trial proceedings, but rather that

he "*actually does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." 509 U.S., at 401, n.12 (emphasis added).

The heightened level of cognizance embodied in the "knowing and voluntary" standard lies at the heart of the test that Panetti and his *amici* ask the Court to adopt. See, *e.g.*, Panetti Br. 37, 45 (asserting that, before execution, a convict should be able to "prepare himself for death as expiation for his offense" and "suffer the anguish of realizing that he is being put to death for what he did" (quotation marks omitted)); APA Br. 17 (proposing a test that would require capital convicts to have "more than a shallow understanding of why they are being executed"); ABA Br. 5-6 (urging that convicts must have a "meaningful" or "deeper" understanding of their fates).

The true substance of Panetti's proposed test is thus even less supportable than an accurately labeled "rational understanding" test would be. Even putting aside concerns about vagueness, requiring a "deep" or "meaningful" appreciation of the State's reasons for imposing the death penalty would create an even greater risk that the Court's test could be circumvented through malingering or abuse. See *supra* Part II.C.1. These same concerns would apply at the competence-to-stand-trial stage – which explains, in part, why the mere *capacity* to have a "rational understanding" of the proceedings, rather than actual demonstration of the "deeper" type of understanding embodied in the "knowing and voluntary" requirement, is all that competence test requires. *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Dusky*, 362 U.S., at 402).[19]

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[19] By contrast, use of the "knowing and voluntary" inquiry in the specific contexts of competence to plead guilty or to waive the right to counsel presents no such risk because malingering or noncooperation would only *frustrate*, rather than facilitate, a defendant's expressed intention to waive those rights.

When viewed in light of the overall death-row population, Panetti's proposal is especially problematic. As a matter of common understanding, most individuals who commit heinous murders are, almost by definition, not entirely sane. Although estimates vary, some sources indicate that as many as 70 percent of death-row inmates suffer from some form of schizophrenia or psychosis. Nancy S. Horton, Restoration of Competency for Execution: Furiosus Solo Furore Punitur, 44 Sw. L.J. 1191, 1204 (1990) (citing Amnesty International, United States of America: the Death Penalty 108-09 (1987)); see JA 142 (expert testimony that most of the convicts in federal Bureau of Prisons hospitals are schizophrenic). Many, if not most, schizophrenics exhibit the type of delusional thinking that Panetti has been observed to exhibit. See Douglas Mossman, Atkins v. Virginia: A Psychiatric Can of Worms, 33 N.M. L. Rev. 255, 280 (2003); APA Br. 8 (noting that "[d]elusional thinking is a hallmark symptom of schizophrenia" (citing DSM-IV-TR 299-301, 312)).[20] Accordingly, Panetti's "rational understanding" requirement would be applied to a population that is, in significant part, delusional – and thus necessarily *irrational*. See APA Br. 9, n.11.

This situation contrasts sharply with the factual backdrop of *Atkins*. There, the Court quoted expert testimony that "[m]ental retardation is a relatively rare thing. It's about one percent of the population." 536 U.S., at 309, n.5 (quotation marks omitted). Here, the potential population is much larger, and the introduction of Panetti's ill-defined

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[20] Indeed, one death-row study of a limited population noted that half of the profiled inmates exhibited delusional tendencies, which included persecutory delusions (*e.g.*, inmate's belief that he was target of a Jewish conspiracy). Barbara A. Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 39-40 & n.26 (1986) (citing Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Am. J. Psychiatry 393, 393 (1962)). Other inmates in the study coped with their predicament through obsessive rumination, "thinking furiously about other things, such as appeals, religion, or philosophy." *Ibid.*

– and inherently indefinite – "rational understanding" component would render the execution-competence standard substantially overinclusive. See Mossman, *supra*, at 289 ("Given the high rate of serious mental illness among homicide defendants, granting psychiatric exemptions could leave very few individuals eligible for the death penalty.").

Nor is this potential for exempting vast numbers of convicted murderers from execution an unintended consequence of Panetti's and his *amici*'s proposed test. Indeed, *amicus* APA is nothing if not candid, explaining that both its own position and the ABA's is that "an individual who is found incompetent to face the death penalty" should not have his sentence "merely suspended," but should "have his sentence *permanently commuted* to a non-capital punishment." APA Br. 17, n.15 (emphasis added). Thus, the conceded objective of these *amici* (and the predictable consequence of their proposed test) is not simply avoiding the inhumanity of executing a person who is truly insane, but rather removing from death row as large a class of capital convicts as reasonably possible.[21]

### 3. To prevent manipulation of the test, execution competence should turn on cognitive capacity, not on professed beliefs.

In general, "the focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." *Godinez*,

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[21] The objective sought by these *amici* is in keeping with their stated public policy position – that there should be a national moratorium on all executions. See Am. Bar Ass'n, Report with Recommendations No. 107, Feb. 1997, *available at* http://www.abanet.org/irr/rec107.html (last visited Mar. 27, 2007); Am. Psychiatry Ass'n, Moratorium on Capital Punishment in the U.S.: Position Statement, Oct. 2000, *available at* http://www.psych.org/edu/other_res/lib_archives/archives/200006.pdf (last visited Mar. 27, 2007); Am. Psychological Ass'n, The Death Penalty in the U.S., Aug. 2001, *available at* http://www.apa.org/pi/deathpenalty.html (last visited Mar. 27, 2007).

509 U.S., at 401, n.12; *Drope*, 420 U.S., at 171 (articulating a capacity-based test for competence to stand trial). The execution-competence standards that Panetti and his *amici* propose are at times appropriately phrased in terms of capacity. See, *e.g.*, Panetti Br. 29-30, 38, 39, 40 & n.24, 41, 44, 45, 47; APA Br. 6, 16; ABA Br. 4, 5, 7, A-1, B-1. But, at other times, their arguments focus instead on their characterizations of what Panetti *actually* believes. See, *e.g.*, Panetti Br. 22, 27-29, 31-32, 40, 45; APA Br. 3-4, 6-8, 12-13; ABA Br. 7-8.[22]

But any execution-competence standard *not* phrased in terms of capacity would be readily susceptible to circumvention by lies or noncooperation. There are undoubtedly numerous capital convicts who, though mentally ill, are capable of reading and understanding this Court's decisions – or, at the least, understanding their lawyers' explanations of those decisions. If the Court announces an execution-competence test that is not phrased in terms of cognitive capacity, any such convict would have considerable incentive to attempt to avoid execution by "incorrectly" answering (or refusing to answer) any relevant question about his impending fate.[23]

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[22] As much as cognitive capacity should be a part of any execution-competence test that the Court adopts, the "significantly impairs" qualifier that *amici* propose, APA Br. 3, 16; ABA Br. 5, should not. Notably, *amici* offer no defense of this ambiguous qualifier. Indeed, despite the appearance of the phrase in their proposed tests, *amici* at other times appear to support a pure capacity analysis. See, *e.g.*, APA Br. 11-12; ABA Br. 7-8. In any event, given the conflicting diagnoses and subjectivity inherent in mental-illness determinations, "significantly impairs" is no more definite than "rationally understands."

[23] The sample interview questions that the APA offers, APA Br. 18 ("Why have you been sentenced to death?"; "Will you be executed?"), illustrate the problem. Assuming that these questions would strike at the core of the execution-competence test that the Court adopts, and further assuming that capacity were not the test's linchpin, a convict whose mental illness does not affect the relevant aspects of his cognitive capacity could nevertheless escape execution through deliberate misstatements. Perhaps for this reason, in this passage of its brief, the

(Continued on following page)

### 4. Application of the State's proposed test will advance the modern penological interests behind the death penalty.

The Court has recently confirmed that retribution and deterrence are capital punishment's two predominant social purposes. *Roper*, 543 U.S., at 571 (citing *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); accord *Atkins*, 536 U.S., at 318-19. As shown below, application of the State's proposed test will advance each of those interests.[24]

#### a. The State's test will further the retributive purpose of punishment.

Retribution aims either "to express the community's moral outrage or . . . to right the balance for the wrong to the victim." *Roper*, 543 U.S., at 571; see *Atkins*, 536 U.S., at 319 (explaining that retribution is "the interest in seeing that the offender gets his 'just deserts' "). The Court has repeatedly emphasized the societal focus of retribution. See, *e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 836 (1988); see also *Schriro* v. *Summerlin*, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting); *Gregg*, 428 U.S., at 183-84 (joint opinion of Stewart, Powell, and Stevens, JJ.). Panetti misunderstands the societal nature of retribution, erroneously equating it with vengeance. Panetti Br. 46 & n.33. In fact, retribution is the legitimate penological interest that helps *prevent* vengeance. *Tison* v. *Arizona*, 481 U.S. 137, 181 & n.19 (1987) (Brennan, J., dissenting) (explaining that the Eighth Amendment channels impermissible private vengeance into constitutionally permissible retribution); see also *Gregg*, 428 U.S., at 183 (joint

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APA acknowledges that the interviewer's focus should be the convict's "mental capacities," rather than his mere professed beliefs. *Ibid.*

[24] It will also further the penological interest in incapacitation. See *Atkins*, 536 U.S., at 350 (Scalia, J., dissenting) (quoting *Gregg*, 428 U.S., at 183, n.28) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *Spaziano* v. *Florida*, 468 U.S. 447, 461-62 (1984).

opinion of Stewart, Powell, and Stevens, JJ.) (noting that the retributive "function . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs").

**i. The retributive justification for punishment necessarily precedes any execution-competence analysis.**

The viability of retribution as a permissible theory of punishment depends not on the "rational understanding" that a convict may or may not have, see *supra* Part II.C.2; cf. Panetti Br. 46, but rather on the convict's moral culpability at the time he committed his crime, *Enmund* v. *Florida*, 458 U.S. 782, 800-01 (1982) (reflecting that "personal responsibility and moral guilt" define a criminal's level of culpability and concluding that execution of one convict for murders that he did not personally commit failed to serve the retributive goal of punishment).

*Roper* and *Atkins* illustrate this point. In those cases, the Court's decisions turned on its conclusions that members of specific classes of criminals lack sufficient moral culpability at the time of their crimes to be sentenced to death. *Roper*, 543 U.S., at 556, 571 (stating the issue as whether the Constitution permits execution of a criminal "younger than 18 when he committed a capital crime" and concluding that retribution is not served by imposing the death penalty on those "whose culpability or blameworthiness is diminished[ ] to a substantial degree"); *Atkins*, 536 U.S., at 319 (weighing the retributive value of the death penalty in light of "the lesser culpability of the mentally retarded offender"). If *Roper* had looked instead to the status of the criminal at the time of trial, conviction, or sentencing, its holding would not have forbidden his execution. *Roper*, 543 U.S., at 556 (noting that, at the time of his conviction and sentencing, the defendant had turned 18).

In contrast to the proportionality concerns addressed in *Roper* and *Atkins*, in the present context the question of culpability will already have been conclusively – and affirmatively – resolved. The issue is not whether the

Constitution permits society to *impose* the death penalty on a criminal who was, for some reason, less culpable at the time of his crime, cf. *Roper*, 543 U.S., at 556, 578; *Atkins*, 536 U.S., at 306-08, 321, but rather whether an unquestionably valid death sentence may be *carried out* against a criminal who has subsequently become mentally ill, see *Ford*, 477 U.S., at 425 (Powell, J., concurring in the judgment). This is so because any convict to whom the execution-competence test is applied will necessarily have been adjudicated both sane at the time of his offense and competent to stand trial, removing any doubts about culpability that might in some cases arise from mental illness.

### ii. There are substantial problems with the wholly personal view of retribution that Panetti advances.

In addition to its predominate societal focus, the retributive rationale has a secondary concern for capital convicts' awareness of what the death sentence means and why it is being imposed. See *Ford*, 477 U.S., at 409; *id.*, at 422 (Powell, J., concurring in the judgment). Panetti, however, misunderstands both the scope and the prominence of this secondary retributive interest.

Relying heavily on nonjudicial sources, Panetti asserts that retribution requires a condemned prisoner to have a subjective appreciation of the moral impropriety of his criminal conduct and to "suffer the anguish" of knowing the reason for his fate. Panetti Br. 45; see also APA Br. 15 (centering the APA's retribution argument on convicts' "thinking about their forthcoming execution[s]" and whether they have "more than a shallow understanding of why they are being executed" (quotation marks omitted); ABA Br. 6, 8 (supporting a proposed requirement that capital convicts have "a deeper understanding of the state's justifying purpose" of punishment and asserting that a capital convict should "have the capacity to accept responsibility for his crimes" (quotation marks omitted)).

Putting aside its lack of support in case law, there are significant problems with Panetti's mind-of-the-criminal approach. First, tailoring the execution-competence test to the innermost thoughts of capital convicts would present substantial practical problems. It is difficult to imagine how anyone other than the convict himself could accurately assess whether he truly appreciates the magnitude of his moral wrong – at least with respect to a convict who is willing to lie about such things. And under Panetti's proposed test, it would be remarkably easy for a convict to feign his way out of a death sentence.

Second, allowing the execution-competence test to be shaped primarily by a personal, subjective view of the retributive rationale would prevent the execution of convicts who genuinely lack moral qualms about their crimes. It cannot be that amoral capital convicts should be excused from death sentences based on amorality alone. Yet Panetti's proposed standard would yield that result.

**b. Adoption of the State's standard will effectively deter would-be murderers.**

Deterrence is another legitimate basis for punishment distinct from retribution. See *Atkins*, 536 U.S., at 319; *Roper*, 543 U.S., at 571. It embodies society's interest in preventing future criminal acts. *Ibid.* Historically, the deterrent effect of capital punishment has been a matter of substantial debate. See *Gregg*, 428 U.S., at 184-85 (joint opinion of Stewart, Powell, and Stevens, JJ.). The most recent – and most methodologically advanced – scholarship, however, reflects a growing consensus among economics scholars that imposition of the death penalty substantially deters capital murder.[25] See Panetti Br. 47

[25] See, *e.g.*, Dale O. Cloninger & Roberto Marchesini, Execution Moratoriums, Commutations and Deterrence: The Case of Illinois, 38 Applied Econ. 967, 971 (2006); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 189-90 (2004); Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from

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(acknowledging "the deterrent effect of the death penalty"); see also Legal Historians Br. 25 (noting that "[d]eterrence was a key rationale for the death penalty at common law").

Necessarily, the question of execution competence will arise only in proceedings founded on valid convictions, and valid convictions depend on criminals' sanity at the time of the crime, *Clark*, 126 S.Ct., at 2718-21; ALI, Model Penal Code §4.01(1). Assuming he is neither underage nor mentally retarded, any sane prospective criminal can be expected to fully appreciate the possibility that he could be put to death for committing capital murder. In *Roper* and *Atkins*, a prospective criminal in the same class as the defendant would either be mentally retarded or under eighteen years of age at the time of the prospective crime – and thus arguably unable to appreciate the force of the death penalty's deterrent effect. *Roper*, 543 U.S., at 571-72; *Atkins*, 536 U.S., at 319-20. By contrast, a prospective criminal who is legally sane at the time he commits capital murder has no such excuse. He is fully capable of "premeditation and deliberation" – and, therefore, fully susceptible to the death penalty's deterrent effect. *Enmund*, 458 U.S., at 799 (quotation marks omitted).

Moreover, the deterrent effect of execution will not be measurably lessened by a prospective criminal's unfounded speculation that he might become incompetent after sentencing. See Panetti Br. 47 (agreeing that a prospective capital murderer would not foresee losing his competence to be executed sometime after he commits his crime). But, were Panetti's standard to be adopted, the increased likelihood of avoiding the death penalty through malingering or manipulating psychological examiners might well reduce the fears of prospective murderers and,

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Postmoratorium Panel Data, 5 Am. Law & Econ. Rev. 344, 372-73 (2003); H. Naci Mocan & R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453, 473-74 (2003).

as a result, unjustifiably reduce the death penalty's deterrent force. Cf. *Skipper* v. *South Carolina*, 476 U.S. 1, 14 & n.2 (1986) (Powell, J., concurring in the judgment).[26]

### D. Under Both the State's Proposed Test and the Test That the Court of Appeals Applied, Panetti Is Competent To Be Executed.

In evaluating Panetti's competence to be executed, the court of appeals – like all of the other courts of appeals that have faced this issue[27] – applied its interpretation of the execution-competence test articulated by Justice Powell in his *Ford* concurrence. It asked whether the evidence showed Panetti to be "unaware of the punishment [he is] about to suffer and why [he is] to suffer it," JA 379 (quoting *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment)), and appropriately rejected Panetti's argument for inclusion of a "rational understanding" component, *id.*, at 384; see *supra* Part II.C.2.

Under the State's proposed test, Panetti could properly be held incompetent to be executed only if, because of mental illness, he lacked the capacity to recognize that his punishment (1) is the result of his being convicted of capital murder and (2) will cause his death. To the extent this test varies from that applied by the court of appeals, any such variances are immaterial to the result because,

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[26] Indeed, adoption of the APA's and ABA's proposed standard – whereby the sentences of convicts lacking "rational understanding" would be permanently commuted to non-capital sentences, APA Br. 17, n.15 – would provide a predictable ex ante roadmap for a would-be murderer currently on medication for mental illness. If that murderer were to commit his crime, be convicted, and be sentenced to death, he could simply intend to go off his medication and lose rationality for a time, thus avoiding the death penalty permanently. For such an individual, the deterrent effect of capital punishment would, at the very least, be substantially diminished.

[27] *Walton* v. *Johnson*, 440 F.3d 160, 173 (CA4 2006); *Scott* v. *Mitchell*, 250 F.3d 1011, 1014 (CA6 2001); *Massie* v. *Woodford*, 244 F.3d 1192, 1195 & n.1 (CA9 2001); *Rector* v. *Clark*, 923 F.2d 570, 572 (CA8 1991).

as shown below, the record establishes that Panetti is competent to be executed under either standard.

First of all, it is undisputed that Panetti has the capacity to recognize that the punishment he faces is death. Indeed, the experts all agreed and the district court expressly found that, as a factual matter, "Panetti is aware he is to be executed," JA 363, 372; accord JA 373. Panetti did not oppose this conclusion in the district court, see JA 367, 372, did not challenge it in the court of appeals, and does not challenge it here. Therefore, Panetti is unquestionably "[]aware of the punishment [he is] about to suffer," JA 379 (quoting *Ford*, 477 U.S., at 422 (Powell, J., concurring in the judgment)) – a finding that, in reflecting Panetti's actual *demonstration of* his capacity to recognize that his punishment will cause his death, goes beyond the capacity that the State's test requires.

The only question that remains is whether Panetti has the capacity to recognize that his punishment is the result of his being convicted of capital murder, or, under the court of appeals's analysis, whether he is aware of why he is to be executed, JA 379. The record establishes that Panetti passes each of these prongs as well.

Dr. Parker and Dr. Anderson each testified that Panetti has the capacity to understand that he is being executed for the murders of which he was convicted. JA 245, 247 (testimony of Dr. Parker), 303-04 (testimony of Dr. Anderson); accord JA 75 (joint report of Drs. Parker and Anderson), and the district court explicitly concluded that "[t]here is evidence in the record to support a finding that Panetti is *capable* of understanding the reason for his execution," JA 367. Again, Panetti does not challenge this conclusion. And under the State's proposed test, it is irrelevant that these witnesses "were unable to reach a formal conclusion that [Panetti] did, in fact, understand" the reason for his execution. JA 364. For the reasons already noted, it is the *capacity* to understand – rather than actual demonstration of understanding – that defines the minimal level of competence needed to satisfy this prong of the State's proposed test. See *supra* Part II.C.3.

And with respect to the court of appeals's test, the district court accurately noted that two of Panetti's own execution-competence experts testified that, "despite his delusions, Panetti understands [that] the State's stated reason for seeking his execution is for his murders." JA 366; see also JA 157 (testimony of Dr. Conroy); JA 214 (testimony of Dr. Rosin). Thus, not only did the district court explicitly find that "Panetti is aware he committed the murders that serve as the basis for his execution," JA 372, but the court further found that "Panetti understands the State's stated reason for executing him is that he committed two murders," JA 372.

The district court also correctly concluded that the alternative sense of "understand" embodied in Panetti's proposal did not match the court of appeals's standard. JA 369 (noting that the court of appeals's test does not require the type of "rational understanding" that Panetti purports to distill from Justice Powell's *Ford* concurrence); JA 373 (noting that a capital convict's delusional beliefs "do not bear on the question of whether [he] knows the reason for his execution for the purposes of the Eighth Amendment" (quotation marks omitted)).

In sum, the record establishes that Panetti: (1) has the capacity to recognize that his punishment will cause his death (and does in fact does recognize this); and (2) has the capacity to recognize that his punishment is the result of his being convicted of capital murder (or, within the meaning of the court of appeals's test, is aware of why he is to be executed). Taken together, these facts conclusively establish Panetti's competence to be executed under both the court of appeals's test and the State's proposed test.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 06-6407

Supreme Court, U.S.
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In The
# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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## CAPITAL CASE

## SUPPLEMENTAL QUESTION PRESENTED

Must petitioner's habeas application be dismissed as "second or successive" pursuant to 28 U.S.C. §2244?

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## SUMMARY OF THE ARGUMENT

The Court asks whether Panetti's habeas petition raising an execution-competence claim under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), must be dismissed as "second or successive" pursuant to 28 U.S.C. §2244. Order in *Panetti* v. *Quarterman*, No. 06-6407, 2007 WL 957524 (U.S. Apr. 2, 2007) (Mem.). The answer is yes: under the plain text of §2244(b), Panetti's second federal habeas application must be dismissed.

It is undisputed that Panetti's first federal habeas application, which was fully and finally adjudicated on the merits, failed to raise a *Ford* claim. Thus, Panetti's subsequent habeas application, which did raise a *Ford* claim, was a "second or successive" application under the terms of §2244(b). Because Panetti did not request prior authorization from the court of appeals to file that subsequent application, §2244(b) precluded district-court jurisdiction over it. And, even if Panetti had sought and obtained authorization from the court of appeals, the district court still would have lacked jurisdiction because Panetti's *Ford* claim could not, as a matter of law, have qualified as reviewable under the exacting test of §2244(b)(2).

The Court's precedent is in accord with this plain-text reading of the statute. Although *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), did not resolve the precise question presented here, it established that *Ford* claims raised in second or successive habeas applications cannot meet §2244(b)'s jurisdictional requirements, and it provided a clear path for preserving *Ford* claims for ultimate adjudication—by raising them in the first federal habeas application, then "reopening" them when an execution date is set.

Panetti failed to follow that clear path, and he also disregarded Fifth Circuit precedent when he failed to raise his *Ford* claim in his first federal habeas petition. Thus, Panetti cannot credibly argue that it is inequitable to subject him to the terms of §2244. Panetti was on full notice of the law—under the express terms of *Martinez-Villareal* and *In re Davis*, 121 F.3d 952 (CA5 1997), both decided *before* Panetti's first federal habeas application. He was also on

full notice of the facts underlying his claim—having alleged incompetence at every single stage of this litigation. Nonetheless, he failed to preserve the claim.

Finally, Panetti cannot demonstrate that §2244 is unconstitutional. Any such argument would necessarily fail in light of the availability of (1) preserving *Ford* claims on first federal habeas to be reopened under *Martinez-Villareal*, (2) certiorari review from state-court determinations of execution competence, and (3) original habeas proceedings raising *Ford* claims in this Court. See *Felker* v. *Turpin*, 518 U.S. 651 (1996).

## ARGUMENT

The Court's request for briefing on whether Panetti's habeas application is jurisdictionally barred under §2244 does not mark the first appearance of that issue in this case. The State urged the district court to dismiss Panetti's petition on that very ground, or, alternatively, to transfer his petition to the court of appeals so that he could seek the necessary leave to file a second petition under §2244(b)(3). JA 122. In considering the State's motion, the district court noted that both this Court and the Fifth Circuit had expressly declined to resolve the successive-petition issue in the context of Panetti's scenario. JA 123-26. Faced with what it deemed an open question, the district court rejected the State's argument, holding that, because Panetti's execution date had not yet been set at the time of his first federal habeas petition, his execution-competence claim was not then ripe, and thus could be asserted for the first time in a second petition. JA 127. Ultimately, though, the district court found on the merits that Panetti is competent to be executed. JA 373.

Having prevailed on the merits of Panetti's execution-competence claim, the State chose to defend that result in the court of appeals and not to press the successive-petition issue that the district court found to be *res nova*. The court of appeals declined to address any issues under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—even those raised by the

State—and affirmed the judgment that Panetti is competent to be executed. JA 376. And, before this Court, the State likewise focused initially on the competence issue that three courts had already resolved in its favor. Nonetheless, because authorization under §2244 is necessary for subject-matter jurisdiction, *Burton* v. *Stewart*, 127 S.Ct. 793, 796 (2007) (*per curiam*), it remains as an antecedent question for this Court to decide. Now, at the Court's request, the State has revisited that issue, and it once again urges that Panetti's second federal habeas petition should be dismissed for lack of jurisdiction under §2244.

## I. The Plain Text of 28 U.S.C. §2244(b) Requires Dismissal of Panetti's Second Federal Habeas Application.

The Court recently confirmed that federal district courts lack jurisdiction over unauthorized second or successive habeas applications. *Burton*, 127 S.Ct., at 796. Authorization for such applications is governed by 28 U.S.C. §2244, which, in relevant part, provides as follows:

> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional

> error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> * * *
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. §2244(b).

The terms of §2244 are binary: either a claim was presented in first federal habeas, in which case §2244(b)(1) applies, or it was not presented in first federal habeas, in which case §2244(b)(2) applies. In this case, it is undisputed that Panetti's *Ford* claim was not presented in his first federal habeas application. Federal Petition for Writ of Habeas Corpus, No. 99-CV-260 (W.D. Tex. Sept. 7, 1999); see JA 355, n.1. Therefore, §2244(b)(1) is inapplicable. Rather, because Panetti's *Ford* claim was not presented until his second federal habeas application, see Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 26, 2004); JA 355, that claim is governed by §2244(b)(2).

Under the plain text of §2244(b)(2), Panetti cannot obtain relief for two reasons. First, the statute requires that a petitioner must move, in the court of appeals, for an order authorizing the district court to consider his successive habeas application. 28 U.S.C. §2244(b)(3)(A). Second, in order for that claim to proceed, the court of appeals must find that the applicant made a prima facie showing of §2244(b)(2)'s substantive requirements. *Id.*, §2244(b)(3)(C). Panetti satisfied neither statutory requirement. It is undisputed that he never filed a §2244(b)(3)(A) motion in connection with his *Ford* claim. That fact alone is dispositive. But even if he had filed such

a motion, he could not have satisfied §2244(b)(2)'s requirements.

First, Panetti could have pointed to no "new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable." *Id.*, §2244(b)(2)(A). The sole claim at issue in Panetti's second habeas application is based on *Ford*—a case decided years before his conviction and sentence. Under no plausible theory of statutory interpretation could the Court's 1986 decision in *Ford* be considered, in 2004, to be a "new rule of constitutional law." Thus, review was barred under §2244(b)(2)(A).

Second, even assuming *arguendo* that "the factual predicate for [Panetti's] claim could not have been discovered previously through the exercise of due diligence," *id.*, §2244(b)(2)(B)(i),[1] Panetti could not, as a matter of law, have established the second necessary predicate for relief under §2244(b)(2)(B): that "no reasonable factfinder would have found [him] *guilty of the underlying offense*," *id.*, §2244(b)(2)(B)(ii) (emphasis added). By its nature, Panetti's *Ford* claim does not question the jury's finding of guilt; rather, it challenges only the State's current ability to carry out a sentence. As such, it falls outside the terms of §2244(b)(2)(B).

---

[1] Having asserted that "incompetency runs like a fissure through every proceeding in this case," Panetti Br. 6, and having devoted a substantial portion of his opening brief to establishing that claim, *id.*, at 6-28, Panetti cannot reasonably argue—much less make a prima facie showing, 28 U.S.C. §2244(b)(3)(C)—that his *Ford* claim "could not have been discovered previously through the exercise of due diligence," *id.*, §2244(b)(2)(B)(i); see also JA 123 (district court's observation that "Panetti's history of mental illness predates his first habeas petition"). Indeed, in his first federal habeas petition, Panetti asserted incompetence to stand trial and incompetence to waive counsel, Federal Petition for Writ of Habeas Corpus, No. 99-CV-260 (W.D. Tex. Sept. 7, 1999), and there is substantial overlap in the evidence he presented in support of those claims and the evidence he first presented in support of his *Ford* claim, compare *ibid.*, with JA 337-53, and Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 27, 2004).

In sum, absent a motion requesting authorization from the court of appeals, the district court lacked jurisdiction to consider Panetti's second habeas application. 28 U.S.C. §2244(b)(3)(A). And even if Panetti had sought authorization, his *Ford* claim would have failed to qualify, as a matter of law, as a permissible basis for a second or successive habeas application. *Id.*, §2244(b)(2)(B). Applying the plain text of 28 U.S.C. §2244(b), the Court should vacate the court of appeals's judgment and instruct the district court to dismiss Panetti's second habeas application on remand. See *id.*, §2244(b)(2).

## II. Controlling Precedent Required Panetti To Assert His *Ford* Claim in His Initial Habeas Application.

As the district court recognized, there is admittedly some tension between (1) the fact that §2244 facially bars an execution-competence claim raised for the first time in a second or successive habeas petition, see *supra* Part I, and (2) the reality that an execution-competence claim generally does not become ripe until after the final resolution of a convict's first federal habeas petition because the States—at the urging of the federal courts—usually delay setting execution dates until after that procedural dénouement. JA 123. That tension, however, is the necessary consequence of the plain text of §2244.

The Court largely harmonized this tension in *Martinez-Villareal*—sixteen months *before* Panetti filed his first federal habeas application. That decision, together with relevant Fifth Circuit precedent, provided Panetti with a clear road map for preserving the execution-competence claim that he was certain to make in light of his troubled mental-health history and his litigation strategy of raising competence challenges at every stage of this case.

### A. This Court's Precedent Strongly Suggests That the District Court Lacked Jurisdiction To Resolve Panetti's *Ford* Claim.

The year before Panetti filed his first federal habeas application, *Martinez-Villareal* squarely addressed the intersection of *Ford* and §2244(b). In 1993 (before the AEDPA

had been enacted), Martinez-Villareal first raised a *Ford* claim in a federal habeas application in district court. 523 U.S., at 640.[2] Because Martinez-Villareal's execution date had not yet been set, the district court dismissed his *Ford* claim as premature. *Ibid.* It granted the writ on other grounds, and the court of appeals reversed and remanded on those other grounds. *Ibid.* By the time of remand, the AEDPA had become effective. *Ibid.* Fearing that any new habeas application would be jurisdictionally barred under §2244(b), Martinez-Villareal requested that the district court reopen his previous habeas application and rule on the *Ford* claim he had previously raised. *Ibid.* The district court denied that request. *Ibid.*

Martinez-Villareal then unsuccessfully raised execution competence in state court, and subsequently renewed his request that the federal district court reopen his *Ford* claim. *Ibid.* In 1997, after the district court ruled that the AEDPA deprived it of jurisdiction over that claim, Martinez-Villareal sought authorization from the court of appeals under §2244(b)(3)(A) to file a successive habeas application reasserting his *Ford* claim. *Id.*, at 641. The court of appeals, in turn, held §2244(b) inapplicable and directed the district court to rule on the *Ford* claim that Martinez-Villareal had raised in his previous federal habeas application. *Ibid.*

On certiorari review, the Court first observed that, if Martinez-Villareal was indeed presenting his *Ford* claim in a "second or successive" application distinct from the one that he had filed in 1993, that subsequent application "plainly should have been dismissed" under §2244(b)(1). *Id.*, at 642. The Court concluded, however, that "the only claim on which [petitioner] now seeks relief is the *Ford* claim *that he presented to the District Court . . . in 1993.*" *Id.*, at 643 (emphasis added). The Court, in other words, rejected the notion that Martinez-Villareal's 1997 request for relief under

[2] Although Martinez-Villareal's 1993 application was his fourth overall, it was the first application that the district court did not dismiss as unexhausted. 523 U.S., at 640. Accordingly, it did not qualify as a "second or successive" petition. *Slack* v. *McDaniel*, 529 U.S. 473, 485-86 (2000).

*Ford* constituted a successive application for habeas relief separate from the one he had made in 1993. *Ibid.*; see also *Burton*, 127 S.Ct., at 797-98. Accordingly, the Court agreed with the court of appeals that §2244(b)(3)'s authorization procedures were inapplicable. 523 U.S., at 643-44.

In a footnote, the *Martinez-Villareal* Court limited the scope of its holding as applicable only to cases in which a petitioner had preserved his *Ford* claim by raising it initially, and expressly reserved judgment on the question now presented by Panetti:

> "[t]his case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id.*, at 645, n.*.

This footnote precisely describes the scenario in this case. It is undisputed that Panetti failed to raise his *Ford* claim in his first federal habeas application—and that he raised that claim for the first time in his *second* habeas application. Second Federal Petition for Writ of Habeas Corpus, No. 04-CV-42 (W.D. Tex. Jan. 26, 2004); see JA 355.

Moreover, the language and reasoning of *Martinez-Villareal* strongly suggest that Panetti's failure to assert his *Ford* claim in his initial federal habeas application deprived the district court of jurisdiction. To wit, the Court explicitly foreclosed any relief under (b)(2):

> "Even if we were to consider the *Ford* claim to be newly presented in the 1997 petition [i.e., to assume that it had not been previously presented], *it does not fit within either of subsection (b)(2)'s exceptions, and dismissal would still be required.*" 523 U.S., at 642 (emphasis added).

In short, *Martinez-Villareal* endeavored to harmonize the tension between *Ford* claims and the plain text of §2244. It created a limited avenue for *Ford* claims that were raised on first federal habeas to be "reopened" once

they became ripe. *Id.*, at 645-46. At the same time, *Martinez-Villareal* made clear that, absent reopening of an earlier *Ford* claim, the terms of §2244 preclude relief.

Despite this precedent from the Court handed down the year before he filed his first federal habeas application, Panetti failed to follow the clear road map that the Court had laid out as to how to preserve his *Ford* claim. Instead, he omitted that claim entirely from his first federal habeas application. Because, unlike in *Martinez-Villareal*, there is now no prior claim in Panetti's case to "reopen," the plain text of §2244 bars relief.

### B. Controlling Circuit Precedent Required Panetti To Present His *Ford* Claim in His Initial Habeas Application.

Not only did *Martinez-Villareal* leave little doubt that Panetti was required to present his *Ford* claim in his initial habeas application, but controlling circuit precedent also confirmed that directive. Two years before Panetti filed his initial habeas application, the Fifth Circuit handed down *Davis*—a decision that, like *Martinez-Villareal*, directly addressed the intersection of *Ford* and §2244.

In *Davis*, a capital murderer requested authorization to file a second federal habeas application raising a *Ford* claim for the first time in federal district court. 121 F.3d, at 953; see *Davis* v. *Scott*, 51 F.3d 457, 458 (CA5 1995) (addressing Davis's first federal habeas application raising sentencing issues). Because Davis's execution date had not yet been set, the court denied as premature his motion for §2244(b)(3)(A) authorization without prejudice. *Davis*, 121 F.3d, at 953.

After finding §2244(b)(1) inapplicable because Davis had not presented a *Ford* claim in his previous federal habeas application, the *Davis* court concluded that §2244(b)(2) applied. *Id.*, at 953-54; see *supra* Part I. It then surveyed other courts of appeals' decisions concluding that *Ford* claims could not satisfy either of the two

§2244(b)(2) elements, 121 F.3d, at 954-55, before reaching that same conclusion with respect to Davis's *Ford* claim.[3] *Id.*, at 956 (stating that the court was bound by the plain language of §2244(b)); see *supra* Part I.

*Davis* left no doubt about what Panetti should have done if he wanted to pursue a *Ford* claim in federal district court—raise it in his initial habeas application. It is noteworthy that numerous other Fifth Circuit habeas petitioners have understood §2244(b)'s requirements and raised *Ford* claims, unripe though they were at the time, in their initial habeas applications. See, *e.g.*, *Green* v. *Livingston*, Federal Petition for Writ of Habeas Corpus, No. 4:07-CV-00827 (S.D. Tex. Mar. 6, 2007); *Staley* v. *Dretke*, 126 Fed. Appx. 667, 668 (CA5 Mar. 23, 2005) (unpublished); *Patterson* v. *Cockrell*, 69 Fed. Appx. 658, 2003 WL 21355999, at *2 (CA5 May 23, 2003) (unpublished); *Hatten* v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 2:02-CV-020 (S.D. Tex. Apr. 18, 2003); *Delk* v. *Cockrell*, No. 02-40326, 2002 WL 32598585, at *1 (CA5 Feb. 28, 2002) (unpublished); *Mines* v. *Cockrell*, Federal Petition for Writ of Habeas Corpus, No. 3:00-CV-2044 (N.D. Tex. Apr. 20, 2001); *Billiot* v. *Puckett*, 135 F.3d 311, 313 (CA5 1998); *Caldwell* v. *Johnson*, No. 3-95-CV-625-T (N.D. Tex. Sept. 8, 1998).

Thus, in 1999, Panetti faced circuit precedent explicitly holding that *Ford* claims not raised on first

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[3] One of the cases that the *Davis* court referenced was the court of appeals's decision in *Martinez-Villareal*. *Davis*, 121 F.3d, at 954-55. It distinguished *Martinez-Villareal*, however, on the basis that Davis—unlike Martinez-Villareal—had *not* asserted a *Ford* claim in a previous federal habeas application. *Id.*, at 955; see *supra* Part II.A.

Since *Davis* was decided, two additional court of appeals decisions have similarly concluded that §2244(b) bars district-court jurisdiction over *Ford* claims raised for the first time in second or successive federal habeas applications. *In re Provenzano*, 215 F.3d 1233, 1235 (CA11 2000); *Nguyen* v. *Gibson*, 162 F.3d 600, 601 (CA10 1998) (*per curiam*). And the Fifth Circuit has subsequently confirmed that it considers *Davis* to be consistent with this Court's decision in *Martinez-Villareal*—precisely because the latter preserved his *Ford* claim whereas the former did not. See *Richardson* v. *Johnson*, 256 F.3d 257, 258-59 (CA5 2001).

federal habeas are barred by §2244 and Supreme Court precedent expressly laying out a road map to "reopen" such claims made initially in first federal habeas. Nevertheless, Panetti failed to follow that guidance.

## III. Requiring *Ford* Claims To Be Presented in Initial Habeas Applications Is Both Equitable and Constitutional.

### A. Applying §2244(b) as Written Will Allow Habeas Petitioners To Have Their *Ford* Claims Heard.

*Martinez-Villareal* allows all capital convicts—even those who are not presently incompetent—to preserve *Ford* claims by raising them contingently in their initial habeas applications. Approval of that practice would ensure eventual federal-district-court jurisdiction over *Ford* claims that were prematurely raised in initial habeas applications. See *Martinez-Villareal*, 523 U.S., at 644 (concluding that any such claim "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies"). At the same time, it would prevent any perceived need to loosen or circumvent §2244(b)'s restrictions on second and successive federal habeas applications in contravention of the statute's plain text and purpose.[4]

In response, Panetti can be expected to invoke broad principles of equity. But equity does not fit the facts of the instant case. At the intersection of possible *Ford* claims and the strictures of §2244, one could hypothesize three potential factual scenarios. *First*, one could imagine an individual,

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[4] In its order rejecting the State's argument that Panetti's habeas application should be dismissed under §2244(b), the district court erroneously concluded that, under *Martinez-Villareal*, a capital convict in Panetti's position "cannot bring his *Ford* claim in an initial petition because it is not ripe." JA 126. In fact, *Martinez-Villareal* requires just that; such a claim will initially be dismissed *without prejudice*, and federal-district-court jurisdiction may eventually be secured only through the *reopening* of that claim once it ripens. See *supra* Part II.

totally sane at the time of his crime, his trial, and his first federal habeas application, who subsequently was stricken by mental illness and became incompetent to be executed. *Second*, one could imagine an individual, with some limited mental illness at the time of his first federal habeas application, whose condition subsequently deteriorated significantly so that he later became incompetent to be executed. And *third,* one could imagine an individual, with significant mental illness at the time of his first federal habeas application, who subsequently relied on that same indicia of mental illness to urge execution incompetence.

In terms of equity, the first scenario presents by far the most compelling circumstances—the treatment of which need not be resolved in this case. Panetti's circumstances, by any measure, are nowhere near that first scenario. Instead, Panetti presents the third scenario: from day one, his central defense has been his alleged incompetence—at the time of the crime, at trial, on habeas, and now at execution. Panetti's briefing does not demonstrate any material change in his condition that occurred after he filed his first federal habeas application. To the contrary, he asserts instead that "incompetency runs like a fissure through every proceeding in this case," Panetti Br. 6, and endeavors therefore to undermine all of his prior competence determinations.

The difference between each of these three hypothetical scenarios is notice, in particular the degree of notice that a defendant can be imputed to have had at the time of first federal habeas. For one caught totally unawares of any potential *Ford* claim, the strictures of §2244 may prove particularly harsh. But, for a defendant such as Panetti—who, given his prior litigation strategy, could not have conceivably been on greater notice that he would ultimately be bringing a *Ford* claim on the eve of execution, see *supra* n.1—there is nothing remotely inequitable about §2244's requirement that he first preserve that claim by bringing it on first federal habeas.

### B. Section 2244(b)'s Requirement That *Ford* Claims Be Asserted in Initial Habeas Applications Is Constitutional.

Like other habeas petitioners before him, see, *e.g.*, *Davis*, 121 F.3d, at 956, Panetti may also argue that §2244(b) unconstitutionally precludes federal-court consideration of ripe *Ford* claims presented as soon as mental illness reaches a level arguably sufficient to deprive the petitioner of competence to be executed. In light of the numerous avenues for federal-court review of execution-incompetence claims other than through second or successive habeas petitions filed in federal district court, this argument fails at the outset.

In rejecting challenges to §2244(b) that a habeas petitioner might assert under the Constitution's Exceptions Clause (Article III, §2) and Suspension Clause (Article I, §9), the Court's decision in *Felker* highlighted several distinct ways that federal habeas relief may be sought and obtained from this Court. 518 U.S., at 654.

First, the *Felker* Court unanimously held that because the AEDPA "d[id] not deprive this Court of jurisdiction to entertain original habeas petitions," *id.*, at 658, "there can be *no plausible argument* that the [AEDPA] has deprived this Court of appellate jurisdiction[5] in violation of Article III, §2," *id.*, at 662 (emphasis added). Indeed, the statutory text of 28 U.S.C. §2241(a) expressly vests the Court with original jurisdiction to entertain habeas applications, and this Court's Rule 20.4(a) details the requirements for filing such applications. Sup. Ct. R. 20.4(a) (quoted in *Felker*, 518 U.S., at 665).

Second, in concurring opinions, Justices Stevens, Souter, and Breyer highlighted three additional avenues by which the Court could potentially review habeas applications—through

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[5] See also *Felker*, 518 U.S., at 667, n.1 (Souter, J., concurring) ("Such a petition is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." (citing Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153)).

the All Writs Act, 28 U.S.C. §1651; through review of a court of appeals's interlocutory orders; and through certified question from a court of appeals. *Felker*, 518 U.S., at 666 (Stevens, J., concurring); *id.*, at 667 (Souter, J., concurring). In light of these three alternative ways to seek federal-court review of habeas applications, Panetti cannot plausibly argue that §2244(b) is unconstitutional. See also *id.*, at 664 (unanimously concluding that, because §2244(b)'s restrictions on second or successive habeas applications were "well within the compass" of measures that Congress may take to curb abuse of the writ of habeas corpus, §2244 "d[id] not amount to a 'suspension' of the writ contrary to Article I, §9").

The federal district court in this case nevertheless concluded that application of §2244(b) to *Ford* claims would impermissibly restrict federal-court habeas jurisdiction. JA 126. Specifically, the district court concluded that, because the Texas Court of Criminal Appeals (CCA) lacks jurisdiction to consider a capital convict's attempted appeal of a lower state court's execution-competence finding under Texas Code of Criminal Procedure Article 46.05, the Court likewise lacks jurisdiction to review a state court's determination of execution competence via a writ of certiorari. JA 126.

This conclusion overlooks 28 U.S.C. §1257(a), which grants the Court certiorari jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State *in which a decision could be had*" (emphasis added) whenever a constitutional right is claimed. Because any article 46.05 petitioner seeks vindication of his constitutional right to be free from cruel or unusual punishment, see U.S. Const. amend. VIII, and a Texas district court may qualify—as it did in this case—as "the highest court of a State in which a decision [on an article 46.05 claim may] be had," 28 U.S.C. §1257(a),[6] the Court's certiorari jurisdiction *does* extend to

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[6] Because the CCA has jurisdiction to review a lower court's finding of execution *incompetence*, *Ex Parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000), some article 46.05 claims may proceed to the CCA. But any article 46.05 proceeding in which a state district court concludes that the convict is *competent* to be executed cannot. *Ibid.*

such state-court competence decisions. See *Grovey* v. *Townsend*, 295 U.S. 45, 47 (1935) (finding certiorari jurisdiction to review final order from Texas justice court, where that court was "the highest state court in which a decision may be had"), *overruled in part on other grounds*, *Smith* v. *Allwright*, 321 U.S. 649 (1944).

In sum, application of §2244(b) to *Ford* claims does not violate the Constitution. Even though the statute *restricts Ford* claimants' ability to secure federal-district-court jurisdiction over their claims, it does not *preclude* such jurisdiction over claims that were asserted in initial federal habeas applications. See *supra* Part II. And, even if §2244(b) had that effect, it would still be constitutional in light of the multiple avenues for review of *Ford* claims, either through invocation of the Court's original or appellate jurisdiction, see *Felker*, 518 U.S., at 658, 661-62; *id.*, at 666 (Stevens, J., concurring); *id.*, at 667 (Souter, J., concurring), or through certiorari review of final state-court execution-competence determinations, see 28 U.S.C. §1257(a).

## CONCLUSION

The judgment of the court of appeals should be vacated, and the Court should remand the case with instructions for the district court to dismiss Panetti's second or successive application for habeas relief for want of jurisdiction.

Respectfully submitted,

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In The

# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

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## CAPITAL CASE

## QUESTION PRESENTED

Must Petitioner's habeas application be dismissed as "second or successive" pursuant to 28 U.S.C. § 2244?

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## MR. PANETTI'S HABEAS PETITION RAISING AN EXECUTION COMPETENCY CLAIM IS NOT "SECOND OR SUCCESSIVE" UNDER 28 U.S.C. § 2244.

Counsel for Petitioner Scott Louis Panetti did not include a *Ford* claim in the initial federal habeas petition. In response to this Court's request for supplemental briefing, counsel anticipate the State will argue that the Court must dismiss the current petition raising a *Ford* claim, because it is "second or successive" under AEDPA and counsel did not seek authorization from the Court of Appeals to file it in the District Court. If counsel had sought appellate permission, the State will presumably contend, the Fifth Circuit would have been obliged to deny it, because the *Ford* claim does not meet either of the exceptions to new-claim successors found in 28 U.S.C. § 2244(b)(2). This argument fails for several reasons.

First, the present habeas petition contests the State's attempt to carry out Mr. Panetti's death sentence while he is incompetent. It does not contest the judgment convicting Mr. Panetti of murder and sentencing him to death. The validity of that judgment was the subject of Mr. Panetti's earlier petition. Therefore, this case, unlike *Burton v. Stewart*, 127 S.Ct. 793 (2007), does not involve a second habeas challenge to the same state court judgment. If Mr. Panetti prevails on his *Ford* claim now but later regains competency, the State can carry out its extant, undisturbed judgment by executing him.

Second, the *Ford* claim was not ripe at the time counsel filed Mr. Panetti's initial federal petition. The claim would not become ripe for another four years, after the federal courts rejected all of his challenges to his conviction and sentence, and when his execution was scheduled and imminent. Moreover, Texas law does not contemplate the filing of a *Ford* claim until that time. Therefore, counsel would have been unable to exhaust the claim until after the initial federal habeas proceedings had ended and the State sought an execution date. The phrase "second or successive" in Section 2244(b) is a term of art

that is inapplicable to a *Ford* petition filed in these circumstances, under the reasoning of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). The only way the Court could distinguish *Martinez-Villareal* in Mr. Panetti's case would be to adopt a rule that would require every prudent attorney to include a *Ford* claim in a first federal petition in every capital case, only to have it dismissed as premature. Such a rule would be senseless and inefficient, benefitting no one.

Finally, again unlike the habeas petitioner in *Burton*, Mr. Panetti did not subvert any of the aims of AEDPA or this Court's federal habeas jurisprudence in bringing his *Ford* claim when he did. To the contrary, he could not have brought it earlier consistently with the federal habeas rules requiring exhaustion of state remedies and with Texas law demanding that competency determinations await the setting of an execution date. Nor could he have withheld the claims raised in his initial federal petition until the *Ford* claim in his present petition was ripe for judicial consideration. By the time his *Ford* claim matured, AEDPA's statute of limitations would have time-barred the challenges to his conviction and sentence.

### A. Mr. Panetti's present habeas petition is not "contesting the same custody imposed by the same judgment of a state court" as his earlier petition.

In *Burton*, this Court recently held that a state prisoner seeking federal habeas relief had filed a "second or successive" petition that failed to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b).[1] Burton filed his first federal habeas petition in 1998, challenging his conviction while state review of his sentence was still pending. 127 S.Ct. at 795. After the state courts rejected his sentencing claims, Burton filed another federal habeas petition in 2002, attacking only his sentence. *Id.* at 796.

[1] The text of 28 U.S.C. § 2244(b) is set out in Appendix A.

This Court found that "Burton twice brought claims contesting the same custody imposed by the same judgment of a state court." *Id.* Accordingly, AEDPA required that he first seek and receive authorization from the court of appeals before filing his second petition in the district court. *Id.* Because Burton did not receive permission from the court of appeals, the district court was without jurisdiction to entertain the second petition. *Id.*

Mr. Panetti's present petition is not "second or successive" within the meaning of Section 2244(b) as construed in *Burton*. His earlier habeas petition raised only the usual, trial-type challenges to his state court conviction and sentence. The *Ford* claim contained in his current petition does not attack the validity of that judgment but, instead, contends that the State may not carry out his sentence of death during a time when he is mentally incompetent. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (holding that the Eighth Amendment prohibits the State from taking the life of an insane prisoner); *see id.* at 416-17 (plurality opinion) (describing the Eighth Amendment holding as a "constitutional restriction upon [the State's] execution of sentences"); *id.* at 425 (Powell, J., concurring) (recognizing that, because "the prisoner has been validly convicted of a capital crime and sentenced to death," the only issue "is not *whether*, but *when*, his execution may take place") (emphases in original); *id.* at 425 n.5 (noting that, "if petitioner is cured of his disease, the State is free to execute him"). Consequently, a petition raising only a *Ford* claim is not "second or successive" under 28 U.S.C. § 2244(b)(2) – a phrase that *Burton* recognizes as referring to two or more petitions "contesting the same custody imposed by the same judgment of a state court." *Burton*, 127 S.Ct. at 796. Rather, such a petition is squarely within the class of those that *Martinez-Villareal* held are *not* second or successive. *See* Part B, *infra*.

The distinction between a claim attacking a state court judgment and a claim contending only that the sentence imposed by the state court cannot be carried out under some limited set of supervening circumstances is not an artificial or unfamiliar one. It is the basis for this

Court's recent decisions in cases involving challenges to lethal injection procedures. In *Nelson v. Campbell*, 541 U.S. 637 (2004), the prisoner filed a civil rights action under 42 U.S.C. § 1983 to enjoin the State of Alabama from using an invasive surgical procedure to obtain venous access for a lethal injection. Both the district court and the court of appeals construed the lawsuit as a habeas action and dismissed it for failing to comply with AEDPA's requirements for filing a second or successive petition. *Id.* at 642. This Court held that Section 1983 was the appropriate vehicle, because a lawsuit "seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence." *Id.* at 644. Similarly, in *Hill v. McDonough*, 126 S.Ct. 2096 (2006), the prisoner filed a Section 1983 action seeking an injunction to prevent the State of Florida from using a particular sequence of three drugs to execute him by lethal injection. The Court allowed the case to proceed in the district court without gatekeeper authorization by the court of appeals, holding that Hill's lawsuit could not be viewed as a second or successive habeas petition, because "if successful [it] would not necessarily prevent the State from executing him by lethal injection." *Id.* at 2102.

*Nelson* and *Hill* were civil rights actions under 42 U.S.C. § 1983, not habeas proceedings. However, this Court permitted those cases to proceed under Section 1983 precisely because it concluded that they did not implicate the procedural restrictions that AEDPA and the Court's own rules impose on federal habeas review, including the provisions barring successive petitions.[2] In reaching that conclusion, *Nelson* and *Hill* distinguished between claims

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[2] In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court prohibited state prisoners from using Section 1983 to raise challenges to custody that are cognizable in habeas. The purpose of the rule is to prevent state prisoners from resorting to Section 1983 to circumvent the various procedural restrictions applicable to federal habeas proceedings. *Id.* at 489-90.

that would wholly foreclose execution of a state court judgment and claims that would prevent the execution of the judgment under some set of circumstances but not others. Mr. Panetti's *Ford* claim is exactly like those of Hill and Nelson in that regard: It asserts that the State cannot execute him while he is incompetent, but that it may if he regains his competency. His *Ford* claim does not revisit the state court judgment that was the subject of his earlier federal habeas petition, but argues only that the execution of that judgment must await his return to sanity.

### B. Under the reasoning of *Stewart v. Martinez-Villareal*, a numerically second petition that raises only a previously unripe *Ford* claim is not a "second or successive habeas corpus application" as that phrase is used in 28 U.S.C. § 2244(b)(2).

In *Martinez-Villareal*, this Court refused to treat a prisoner's numerically second petition raising a *Ford* claim as "second or successive" under Section 2244(b)(2). The Court recognized that the statutory phrase "second or successive" is a term of art in the habeas context, not a mere mathematical computation. 523 U.S. at 643-45.[3] It

[3] This conclusion is hardly surprising. The term "second or successive" in Section 2244(b) cannot be given a literal, mathematical meaning without producing patently absurd results. To see why this is so, it is sufficient to observe that the same language, "claim presented in a second or successive habeas corpus application," is used both to prohibit claims "presented in a prior application" (Subsection 2244(b)(1)) and to restrict claims "not presented in a prior application" (Subsection 2244(b)(2)). Consider the commonplace situation of an individual who is convicted of a crime in state court, successfully challenges that conviction in a federal habeas proceeding, is retried and reconvicted for the same crime, and then files a numerically "second" federal habeas application challenging this new conviction. Or consider the situation of an individual who is convicted in state court of a first criminal act, *X*, challenges that conviction in an unsuccessful federal habeas petition, serves his time, commits a second crime after being released, is convicted of this new crime, *Y*, and files a numerically "second" federal habeas application challenging the conviction for *Y*. Are such "second or successive habeas corpus application[s]" within the compass of

(Continued on following page)

further recognized that a petition raising a claim that was not previously ripe for adjudication is not "second or successive." The Court grounded its reasoning on the very nature of *Ford* claims: Intrinsically, they are unripe until execution is scheduled and imminent. *See id.* at 645 (recognizing that, because Martinez-Villareal's execution "was not imminent . . . his competency to be executed could not be determined at that time"); *id.* at 643 (noting that, only after habeas relief was denied by the court of appeals and the Arizona state courts issued an execution warrant was the *Ford* claim "unquestionably ripe"); *id.* at 645 (emphasizing that the *Ford* claim "has not been ripe for resolution until now"); *see also Herrera v. Collins*, 506 U.S. 390, 406 (1993) (recognizing that "the issue of sanity [for a *Ford* claim] is properly considered in proximity to the execution"); *Ford*, 477 U.S. at 429 (O'Connor, J., concurring in the result in part and dissenting in part) (noting that, "until the very moment of execution" the issue of a prisoner's competency to be executed "can *never* be conclusively and finally determined") (emphasis in original).[4]

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Section 2244(b)? Whatever the answers to these questions, they cannot rationally be derived by simple one-plus-one mathematics. Nor can an abacus alone resolve such cases as those of a prisoner who first files an unsuccessful federal habeas petition challenging his state conviction for constitutional trial error and later files another federal habeas petition – challenging the constitutionality of a revocation of parole, *see, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972), or the arbitrary denial of a state-created right to "good time" credit, *see, e.g.*, *Lynce v. Mathis*, 519 U.S. 433 (1997) – on the sentence imposed upon the original state court conviction. To decide each of these cases, a court must do exactly what this Court did in *Martinez-Villareal*: It must construe the statutory language "second or successive habeas corpus application" in a way that makes sense and avoids "seemingly perverse" results. 523 U.S. at 644. It cannot simply incant, "There were two petitions by the same petitioner, so the numerically second one is always out of court."

[4] The point is conceptual as well as practical. Unlike most constitutional claims, a *Ford* claim is forward-looking (challenging the carrying out of an execution in the near future against an arguably incompetent inmate) rather than backward-looking (challenging the constitutionality of proceedings during the petitioner's earlier trial or appeal).

(Continued on following page)

Texas state law is consistent with *Martinez-Villareal*. It does not contemplate a prisoner's filing a *Ford* claim in state court until an execution date is set:

> The fact that appellant had a mental illness when he was tried and sentenced is not determinative of whether he will be sane at the moment of his execution. The proper time to argue the [*Ford*] issue is after appellant has been sentenced to death and his execution is imminent. . . . Thus, appellant's Federal Constitutional claim is not yet ripe and is not properly before this Court in the instant appeal.

*Colburn v. State*, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998). Moreover, Texas law isolates execution competency claims in a proceeding separate from habeas. Article 11.071 establishes "the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." Tex. Code Crim. Proc. art. 11.071 § 1. Article 46.05 deals solely with the procedures for raising and adjudicating *Ford* claims. *See* Petitioner's Merits Brief at App. A (setting out text of Article 46.05). Both *Colburn* and Article 46.05 instruct Texas death row inmates not to raise *Ford* claims until the state and federal courts have adjudicated and rejected all ordinary habeas claims and an execution date is set.

Counsel for Mr. Panetti filed the state habeas petition in 1997 and the initial federal habeas petition in 1999. On October 31, 2003, the state trial court scheduled Mr. Panetti's execution for February 5, 2004. Accordingly, Mr. Panetti's *Ford* claim did not become ripe until six years

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Consequently, it is the setting of an execution date that triggers the cause of action and makes a *Ford* claim ripe. For that reason – as well as the obvious impracticality of determining future competency long in advance of an execution – the claim ordinarily cannot be heard until state and federal courts have finally adjudicated all of the petitioner's backward-looking habeas claims. *See, e.g., Richardson v. Johnson*, 256 F.3d 257, 259 (5th Cir. 2001) (noting that "state courts, in part at our urging, now seldom set execution dates until after the first round of appeals and habeas").

after his state habeas petition was filed and four years after his federal habeas petition was filed. Soon after his *Ford* claim became ripe, counsel for Mr. Panetti filed an Article 46.05 motion and, when it was denied, the federal *Ford* claim. These were the right times for each filing – the times when Texas law and *Martinez-Villareal* contemplate that counsel will determine whether a *Ford* claim is warranted and, if so, file it. *Martinez-Villareal* recognizes that it would be a "seemingly perverse" reading of AEDPA to interpret Section 2244(b) as foreclosing *Ford* claims altogether by making them either always too early or always too late – unripe before they mature and successive after they mature. 523 U.S. at 644. That is no less true when a prisoner does not include an unripe *Ford* claim in his initial petition as when he does.[5] Linguistically and logically, it would make no sense to say that a *Ford* claim is more "second" in Mr. Panetti's case, where counsel raised it only once in federal court, than in *Martinez-Villareal*, where the petitioner raised it twice.

### C. Requiring every condemned inmate to raise a *Ford* claim in his or her initial federal petition would encumber habeas practice with wasteful, burdensome, and purposeless pleadings, benefitting no one.

A ruling that distinguishes Mr. Panetti's case from *Martinez-Villareal* on the ground that his counsel did not raise the *Ford* claim in federal court until it was ripe

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[5] Counsel for Mr. Panetti recognize that *Martinez-Villareal* explicitly reserved the question whether the decision would apply in a case like Mr. Panetti's, where a *Ford* claim was not raised in the inmate's first federal habeas petition. 523 U.S. at 645 n.*. However, to draw a negative inference from that footnote reservation "mistakes the reservation of a question with its answer." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). When the language of a statute that the Court is interpreting in two successive cases "provides for no distinction" between the circumstances presented in the two cases, the Court's construction of that language in the first case "results in the same answer" in the second, despite an explicit reservation of the question in the first opinion. *Id.* at 379.

would have deleterious effects on federal habeas practice. It would virtually guarantee that diligent counsel for the condemned would insert *Ford* claims in every initial federal habeas petition. These claims would necessarily be dismissed as unripe. Such a procedure would serve no purpose, benefit no one, and create needless, futile work for federal judges.

An informal review of reported cases of death row inmates who have been executed since this Court decided *Ford* reveals that the vast majority of inmates do not raise execution competency claims in federal court. The statistics indicate that *Ford* claims are raised in only about six percent of those cases.[6] Treating *Ford* petitions like Mr. Panetti's as "second or successive" would impose a *de facto* obligation on federal habeas counsel for the remaining 94 percent of death row inmates to insert a *Ford* claim in the inmate's first federal petition. At the time the initial petition is filed, counsel cannot be sure that, years later, his or her client will not succumb to mental illness, sustain a severe head injury, or suffer a physical trauma (like a massive stroke) resulting in incompetency. No attorney wants to be responsible for irrevocably forfeiting a potentially valid future claim in a death penalty case. Ordinary caution would lead every prudent attorney to include an "obligatory" *Ford* claim in any condemned inmate's first federal habeas petition – even though the claim cannot be adjudicated at that time and may never become factually supportable.

The progressive mental deterioration that many people with schizophrenia experience should also caution against a rule requiring a petitioner to raise a non-ripe *Ford* claim, even if some facts might suggest the petitioner's potential incompetency at that time. *See Scott v. Mitchell*, 250 F.3d 1011, 1013 (6th Cir. 2001) (concluding that the facts bearing on the petitioner's schizophrenia forming the basis

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[6] Between the date *Ford* was decided on June 26, 1986, and the end of 2006, 996 inmates were executed in the United States. Of those cases with reported decisions, only 61 inmates raised *Ford* claims in federal court.

of his *Ford* claim were not fully available at the time of the earlier petition, because "this mental disease is progressive and . . . its victims do not improve but only get worse").[7] Because the facts could change significantly before an execution date is scheduled and imminent, such a rule serves no purpose, especially when the federal courts cannot address the claim, for it is unexhausted and not yet ripe in state court. In short, no one – not the federal courts, the state courts, the State's lawyers, or habeas counsel – would benefit from such an inefficient and senseless practice. "[I]t is the height of perversity to require a prisoner to present a claim needlessly, at substantial cost to the prisoner and the courts, for the express purpose of seeking a ruling from the court that the claim is being presented at the wrong time." Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 778 (2002). This cannot possibly be what Congress intended AEDPA to accomplish.

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[7] Although a federal district judge should follow *Martinez-Villareal* and dismiss as unripe a *Ford* claim raised long before any possible execution date, a court may advertently or inadvertently reject the claim on the merits. Later, after an execution date is set and the claim becomes ripe, that same court may dismiss a numerically second petition containing it as a same-claim successor categorically barred by AEDPA. The courts pursued this course in *Delk v. Cockrell*, 2002 WL 32598585 (5th Cir. Feb. 28, 2002) (unpublished):

> Notwithstanding the district court's view that Delk's *Ford* claim is being raised for the first time, and in the light of the first proceedings in state and federal court, it appears it was previously raised and that, therefore, he seeks successive habeas relief. Accordingly, pursuant to 28 U.S.C. § 2244(b)(1), Delk is barred from doing so.

*Id.* at *4.

### D. A procedure that permits a petitioner to raise a *Ford* claim only after it has become ripe and has been exhausted is consistent with AEDPA's purposes.

In *Burton*, this Court ordered the prisoner's second federal habeas petition to be dismissed as successive under Section 2244(b)(2). 127 S.Ct. at 799. The Court concluded that Burton should not be permitted to pursue a second federal petition raising claims that were unexhausted at the time he elected to proceed to adjudication on a first petition containing only exhausted claims. *Id.* at 797. Allowing the courts to review the merits of the second petition under these circumstances would violate the "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509, 522 (1982), and increase the risk of piecemeal litigation. *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 180 (2001)). It would also undermine AEDPA, "with its goal of 'streamlining federal habeas proceedings.'" *Id.* (quoting *Rhines v. Weber*, 544 U.S. 269, 277 (2005)).

Unlike Burton, counsel for Mr. Panetti have not tried to circumvent the exhaustion requirement and litigate claims piecemeal. Permitting Mr. Panetti to bring his *Ford* claim in a numerically second petition – after the State seeks an execution date – affirmatively furthers "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan*, 533 U.S. at 181. Texas state law and practice demanded that Mr. Panetti's counsel wait until the *Ford* claim became ripe with the setting of an execution date before exhausting it in state court. Counsel promptly brought the claim in federal court after the state court had adjudicated the claim.

Moreover, unlike Burton, counsel for Mr. Panetti could not have presented the *Ford* claim and Mr. Panetti's habeas claims relating to his conviction and sentence in a single federal petition without running afoul of the statute of limitations. *Burton* noted that the prisoner there would not have risked losing his opportunity to challenge his conviction in federal court if he had waited until after the

state courts completed their review of his sentencing claims. 127 S.Ct. at 798. Because final judgment in a criminal case means sentence, Burton's limitations period did not begin running "until both the conviction *and* sentence 'became final by the conclusion of direct review or the expiration of the time for seeking such review'" – which occurred well after he filed his first federal petition. *Id.* at 799 (quoting 28 U.S.C. § 2244(d)(1)(A)) (internal quotation marks omitted, emphasis in original).

Mr. Panetti, like most petitioners with *Ford* claims, did not have the option of waiting to file his initial federal habeas petition until his *Ford* claim became ripe. His one-year limitations period for the claims challenging his conviction and sentence began running on October 5, 1998, when this Court denied certiorari on direct review. *See Panetti v. Texas*, 525 U.S. 848 (1998).[8] He filed his initial federal petition less than a month before the limitations period expired. Four years later, his *Ford* claim became ripe. Had Mr. Panetti waited until then to file all of his claims in a single federal petition, all but his *Ford* claim would have been untimely.

[8] Mr. Panetti's state habeas proceedings had ended before the Court denied certiorari.

## CONCLUSION

Mr. Panetti's current petition containing the *Ford* claim is not "second or successive" within the meaning of 28 U.S.C. § 2244(b)(2). Accordingly, he did not need to seek authorization from the Court of Appeals before filing it in the District Court.

Respectfully submitted,

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# APPENDIX A

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

### 28 U.S.C. § 2244(b)

### Finality of determination

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate of the claim could not have been discovered previously through the exercise of due diligence; and,

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

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No. 06-6407

In the
Supreme Court of the United States

SCOTT PANETTI,
*Petitioner*,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
*Respondent*.

**On Writ of Certiorari**
**To The United States Court of Appeals**
**For the Fifth Circuit**

# BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER

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Dated: February 22, 2007

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## INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 413,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.[1]

The criminal justice system's treatment of individuals with mental illness is a longstanding ABA concern. The ABA first began to investigate the nature of criminal responsibility and the insanity defense in 1935 and created a "Special Committee on the Rights of the Mentally Ill" in 1945.

In the 1980's, in collaboration with disability and clinical professional groups, the ABA studied criminal justice issues affecting defendants with mental disabilities. The Association developed *Criminal Justice Mental Health Standards,* now incorporated into the ABA *Standards for Criminal Justice*. In August 2006, the ABA adopted and

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. In addition, the parties have consented to the filing of *amicus* briefs in this matter.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

reaffirmed policies concerning various aspects of mental disability and the death penalty.

The ABA takes no position on the advisability of the death penalty *per se*, but has a deep interest in the fairness and integrity of the criminal justice system. Thus, the ABA has a unique and informed perspective to offer as *amicus* on the narrow issue before this Court, as well as a keen interest in this case.

## SUMMARY OF ARGUMENT

The ABA has considered extensively the question of competency for execution of mentally ill offenders and has developed policy that accords with its understanding of what the Constitution requires.

The Association has concluded that execution of a mentally ill offender should occur only if the offender "not only . . . [is] 'aware' of the nature and purpose of punishment but also . . . 'appreciate[s]' its personal application in the offender's own case -- that is, why it is being imposed *on the offender*." Report in Support of Resolution 122A (Aug. 2006)(emphasis in original).[2]

The court below held that a death row inmate who, due to a serious mental disability, suffers from the delusion that the actual reason he is to be executed has nothing to do with his crime is nevertheless competent to be executed. To survive constitutional scrutiny, however, capital punishment must serve

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[2] Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, August 2006, 30:5 Mental and Physical Disability Law Reporter 668, 675 (September-October 2006).

the purpose of retribution. The Fifth Circuit's holding breaks that link because it does not require that the offender have any understanding of the reason he is being put to death -- that is, of the retributive purpose of his execution.

## ARGUMENT

### I. ABA Policy On Competency For Execution Is Informed By The Retributive Purpose of Capital Punishment

In considering the issue of competency for execution of mentally ill inmates, the ABA has endeavored to shape its standards in accordance with its understanding of what the Constitution requires. In examining this question, the ABA has looked to *Ford v. Wainwright*, 477 U.S. 399 (1986), and in particular the thoughtful concurrence by Justice Powell, who cast the deciding vote and provided the most specific articulation of how the Constitution bears on this issue.

Justice Powell emphasized that "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence *and purpose*." He concluded "that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 421, 422 (Powell, J., concurring)(emphasis added).

The year after the *Ford* decision, an interdisciplinary ABA task force developed ABA Criminal Justice Standard 7-5.6,[3]

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[3] *See* http://www.abanet.org/crimjust/standards/mental health_blk.html#7-5.6. Criminal Justice Standard 7-5.6 and the (continued...)

concerning competency for execution. Adopted in 1987, this standard reflects the ABA's considered view of how best to satisfy Justice Powell's articulation of constitutional requirements.

ABA Standard 7-5.6(b) provides that an offender is incompetent for execution if, among other things, he "cannot understand . . . the reason for his punishment." ABA Criminal Justice Standard 7-5.6(b).[4] The accompanying Commentary states that this standard requires, as the minimum measure of competence for execution, that the offender have a "rational understanding . . . of the penalty that is about to be imposed . . .." ABA Criminal Justice Standard 7-5.6(b) cmt.[5]

Recently, the ABA considered this subject again, in an exhaustive, multi-disciplinary review. The ABA-created task force of lawyers and mental health professionals that undertook the review concluded, as the ABA had in 1987, that Justice Powell's formulation in *Ford* is most consistent with what this Court has deemed a core purpose of capital punishment: retribution. Indeed, the task force stressed that "the primary purpose of the competence-to-be-executed requirement is to

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[3] (...continued)
accompanying Commentary are available at pages 290-93 of the Mental Health Standards, http://www.abanet.org/crimjust/standards/mentalhealth.pdf. The Standard is set forth in Appendix A hereto.

[4] This concept was familiar from *Dusky v. United States*, 362 U.S. 402, 402 (1960), using a competence standard (in the context of waiver) requiring, *inter alia*, "a rational as well as factual understanding of the proceedings."

[5] See footnote 3, *supra*, at 291.

vindicate the retributive aim of punishment . . .." Report in Support of Resolution 122A (Aug. 2006).[6]

The task force then considered whether Justice Powell's view could be reduced to a standard containing a greater degree of specificity than the 1987 standard. The policy it developed reaffirms and elaborates on the approach of Criminal Justice Standard 7-5.6(b). The ABA adopted the policy in 2006.[7] The American Psychological Association[8] and the American Psychiatric Association[9] have adopted this same policy (except for a minor variation not relevant here).

The 2006 ABA policy states that a death row inmate is incompetent for execution if he "has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case . . .." ABA Resolution 122A (Aug. 2006), par. 3(d). Someone "who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the

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[6] See footnote 2, *supra*, at 675.

[7] See footnote 2, *supra*, at 668, par. 3(d). The policy is set forth in Appendix B hereto.

[8] *See* American Psychological Association, Council Policy Manual: N. Public Interest - Part 2, VIII.2, par. 3(d) (Feb. 2006), *available at* http://www.apa.org/about/division/cpmpubint2.html#8.

[9] *See* American Psychiatric Association, Mentally Ill Prisoners on Death Row, par. (d) (Dec. 2005), *available at* http://www.psych.org/edu/other_res /lib_archives/archives/200505.pdf.

life of one or more people" should not be executed. Report in Support of Resolution 122A (Aug. 2006).[10]

The report accompanying the 2006 ABA policy specifically addresses the type of situation at issue in this case. If an execution is to be consistent with retribution, the report states, the inmate should have "a deeper understanding of the state's justifying purpose" than mere knowledge that the execution's stated reason is his having been found guilty of the crime. *Id.*[11] So, to be competent to be executed, an offender:

> not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed *on the offender*. This formulation is analogous to the distinction between a "factual understanding" and a "rational understanding" of the reason for the execution.

*Id.*[12]

The Constitution requires this approach, in the ABA's view, because:

> Holding a person accountable is intended to be an affirmation of personal responsibility. Executing someone who lacks a meaningful understanding of the nature of this awesome punishment and its retributive purpose offends

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[10] *See* footnote 2, *supra,* at 676.

[11] *See* footnote 2, *supra*, at 675.

[12] *See* footnote 2, *supra*, at 675 (emphasis in original).

the concept of personal responsibility rather than affirming it.

*Id.*[13]

## II. The Holding Of The Court Below Does Not Serve Capital Punishment's Retributive Purpose

In *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994), and the present case, the Fifth Circuit held that a death row inmate is competent to be executed if he knows that the State is going to execute him and that the State's ostensible reason for executing him is his conviction for one or more capital crimes. Under this approach, it is irrelevant if the offender, due to a serious mental disability, is under the delusion that, regardless of the State's announced rationale, he in fact is being executed for reasons having nothing to do with the crime. Thus, a paranoid schizophrenic who suffers from the delusion that he will be executed not as punishment for his crime but rather to stop him from preaching the Gospel would be considered competent for execution.

The Fifth Circuit's approach is flawed. Most important, it fails to recognize the distinction between, on the one hand, an inmate who lacks the capacity to accept responsibility for his acts and to acknowledge that the State is executing him as punishment for what he did and, on the other hand, an inmate who has that capacity but chooses to blame his execution on others (such as a witness he believes committed perjury).

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[13] *See* footnote 2, *supra*, at 676.

Where, as here, a death row inmate attributes his impending execution to reasons that only someone suffering from a significant mental disability could espouse -- such as a delusion that he is to be executed because of his faith in God -- he cannot be said to have the capacity to accept responsibility for his crimes. If the offender simply cannot understand the true reason a capital sentence is to be carried out against him, his execution would be inconsistent with the constitutional principles established in *Ford.*

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: February 22, 2007

# APPENDIX

## APPENDIX A

### ABA Criminal Justice Standard 7-5.6

**Currently incompetent condemned convicts; stay of execution**

(a) Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that a condemned convict is currently mentally incompetent, execution should be stayed.

(b) A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

## APPENDIX B

## EXCERPTS FROM ABA RESOLUTION 122A

## ADOPTED BY THE HOUSE OF DELEGATES

**August 8, 2006**

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

. . .

3. Mental Disorder or Disability after Sentencing

(a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity . . . (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

. . .

(d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the

punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option.

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IN THE

# Supreme Court of the United States

SCOTT LOUIS PANETTI,

*Petitioner,*

*vs.*

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Does the Eighth Amendment permit the execution of a murderer who has a factual awareness of his guilt and the reason for his execution but who has a delusional belief as to why the state is executing him?

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IN THE

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NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent*.

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, *amici* supporting petitioner seek to expand the constitutional limit on the execution of a person who is

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

presently insane beyond the boundaries of the national consensus of what constitutes insanity for this purpose. The broad and poorly defined contours of this revised standard could only be made definite by many years of litigation. In the meantime, executions of many murderers who are not insane would be delayed, and the states' interests in both retribution and deterrence would be defeated. This result would be contrary to the interests CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

In August 1992, Scott Panetti's wife, Sonja, left him because of his drinking, threatening behavior, and physical abuse, including hitting her in the face with a rifle. See *Panetti* v. *State*, No. 72,230 (Tex. Crim. App., Dec. 3, 1997), p. 2, available at http://www.cjlf.org/briefs/Panetti/PanettiDirectAppeal.pdf. "Sonja took their three-year-old daughter and moved in with her parents, Joe and Amanda Alvarado." *Ibid.* During a confrontation at the Alvarado household, Panetti shot Mr. and Mrs. Alvarado at close range, splattering blood on Sonja and the child. See *id.*, at 3-4.

Following a jury trial on the question of competence, Panetti moved to dismiss his lawyers and represent himself. See *id.*, at 26. The trial court attempted to dissuade Panetti and warned him of the dangers, but he persisted. The court granted the motion and appointed standby counsel. See *id.*, at 26-27. The Court of Criminal Appeals found that the trial court had properly granted the motion after finding an intelligent and voluntary waiver of the right to counsel. See *id.*, at 27-28. Panetti testified on his own behalf and claimed that an alternate personality named "Sarge" had killed the Alvarados. See *id.*, at 5-6. Following affirmance on direct appeal, the state and federal courts denied habeas relief in unpublished opinions.

The state trial court found Panetti competent to be executed. J. A. 99-100. The Federal District Court found that the state court's consideration was inadequate and set its own

evidentiary hearing. J. A. 131-135. Following a hearing and consideration de novo, see J. A. 361, the court denied the petition, applying the Fifth Circuit standard. "Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed." J. A. 373. The Court of Appeals affirmed, *Panetti* v. *Dretke*, 448 F. 3d 815 (CA5 2006), and this Court granted certiorari. J. A. 387.

## SUMMARY OF ARGUMENT

Petitioner's argument that execution of a murderer in his mental state serves no retributive interest finds no support in modern retribution theory as generally understood. His guilt of the crime and deservedness of the punishment are sufficient to justify the punishment. Petitioner relies on an idiosyncratic revision of retribution theory by an opponent of capital punishment to support his argument, and this revision contains obvious fallacies.

Promulgation of a new, broad, and vague standard for competency to be executed would trigger a new wave of last-minute litigation. The delays caused by this move would impair the deterrent effect of the death penalty and cost the lives of innocent people.

## ARGUMENT

### I. A single difficult case should not be an occasion for a sweeping new mandate, removing yet another decision from the people and imposing yet another federal standard.

Petitioner's brief tells a disturbing tale of the trial of a marginally competent defendant who represented himself at trial and was sentenced to death. See Brief for Petitioner 6-16.

Petitioner and supporting *amici* urge this Court to enact a sweeping new rule, dramatically expanding the modest federal limit on execution of the mentally incompetent. They ask this Court to remove this area of law from democratic control, variation among the states, and refinement by legislation as knowledge of the human mind continues to advance. *Amicus* CJLF suggests that the Court keep in mind that it was just such a sweeping and unjustified constitutionalization that caused the problem in this trial in the first place.

But for the decision in *Faretta* v. *California*, 422 U. S. 806 (1975), states would be able to place limits on self-representation and require counsel for marginally competent defendants who can just barely meet the voluntary and intelligent election requirement, see *id.*, at 807, but who are mentally incapable of mounting a coherent defense. At present, any attempt to deal with this problem legislatively would risk massive reversal if the statute were found to be in violation of *Faretta* years later, and a legislator would be foolish to introduce such legislation, however meritorious the reform would be.

The problems of the human mind and mental illness and their relation to criminal law are difficult ones without clear answers. Although we have learned much since the Eighth Amendment was adopted, we still have much to learn. Constitutional case law is a blunt instrument. It can be changed only by deciding new cases, which by the nature of the judicial process means changes must be retroactive for the case in which the change is made and all others similarly situated. See *Griffith* v. *Kentucky*, 479 U. S. 314, 326 (1987). This makes case law ill-suited for issues dependent on advancing scientific knowledge.

A sweeping constitutional edict was the problem in this case. But for *Faretta*, Panetti might have been represented by counsel who could have made a compelling case that his schizophrenia was a potent mitigating circumstance, rather than the obviously bogus alternate personality defense that Panetti himself presented. Standby counsel says the trial was a farce

and a mockery of justice. This was not the state's choice. The state statute merely tracks *Faretta*. See Tex. Code Crim. Proc., Art. 1.051(g). The trial judge was compelled by *Faretta* to grant self-representation over the objection of counsel for both sides. See Brief for Petitioner 11.

Hard cases make bad law, and bad law makes hard cases. This case should not be the occasion for making more bad law. This Court is presented with a case of a mentally ill defendant whose mitigating mental illness was not adequately presented to the jury because of this Court's overreaching decision three decades ago. If the sentence is unjust, the safety valve is executive clemency. The way to prevent future cases like this one is to overrule or substantially modify *Faretta*. A decision federalizing and constitutionalizing a definition of incompetence any broader than the one in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), would cause more injustice than it cures, as discussed in Part III, *infra*.

## II. Petitioner's delusional belief has no bearing on the State's retribution interest in carrying out its judgment.

In *Ford* v. *Wainwright*, 477 U. S. 399, 407 (1986), the Court noted that the rule against executing an insane person was universal in Anglo-American law, but "the reasons for the rule are less sure and less uniform than the rule itself." The *Ford* Court notes that a commentator claims that the retributive interest is not served, *id.*, at 408, and it further notes "serious[] question" on the subject, citing a student note, see *id.*, at 409, but the basis of the holding is the universality of the rule, see *id.*, at 408-410, not any one of the various rationales for it.

In his concurring opinion in *Ford*, Justice Powell wrote that "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." See 477 U. S., at 421. No explanation or citation is given for this statement. The best petitioner can come up with is a decades-old article by a death penalty

opponent. See Brief for Petitioner 45. Our own review of the writings of leading modern advocates of the retributive theory of punishment find no support for the notion that the perpetrator's mental state at the time of punishment is a major or even significant consideration in the retributive value of punishment. Such a position could be derived from retributive principles only in the most extreme forms of insanity, not the kind at issue in this case.

Retribution as a purpose of punishment was once disparaged as mere revenge, but more recently has been widely accepted by criminal law theorists. See 1 W. LaFave, Substantive Criminal Law § 1.5(a)(6), pp. 41-43 (2d ed. 2003). The basic premise of retribution theory is that "the return of suffering for moral evil voluntarily done, is itself just or morally good." H. Hart, Punishment and Responsibility 231 (1968).

> "Retributivism . . . is the view that punishment is justified by the desert of the offender. The good that is achieved by punishing, on this view, has nothing to do with future states of affairs, such as the prevention of crime or the maintenance of social cohesion. Rather, the good that punishment achieves is that someone who deserves it gets it. Punishment of the guilty is thus for the retributivist an *intrinsic* good, not the merely *instrumental* good that it may be to the utilitarian or rehabilitative theorist." M. Moore, Placing Blame: A General Theory of the Criminal Law 87-88 (1997) (emphasis in original).

Unlike utilitarian justifications such as incapacitation and deterrence, retribution is not focused on prevention of crime by the offender or others. See Hart, *supra*, at 234. Unlike rehabilitative justifications, retribution is not focused on the mind of the offender. Moore denounces rehabilitation as paternalistic and says such theories have "no proper part to play in any theory of punishment, even in the minimal sense of constituting a prima facie justification of punishment." Moore, *supra*, at 85-86. Similarly, Hart, *supra*, at 26, notes that

"[r]eforming methods include the inducement of states of repentance, or recognition of moral guilt," and he rejects reform as a justification for punishment.

The focus of retributivism is on society as a whole and what makes for a just society. "[J]ustice requires individuals to accept the pattern of liberty and restraint specified by political authorities . . . . The central wrong in crime . . . [is] that the criminal unfairly usurps liberty to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law." Bradley, Retribution: The Central Aim of Punishment, 27 Harv. J. L. & Pub. Pol'y 19, 23 (2003). "The criminal's act of usurpation is equally unfair to everyone else, in that he has gained an undue advantage over those who remain inside the legally required pattern of restraint. ¶ Depriving the criminal of this ill-gotten advantage is therefore the central focus of punishment." *Ibid.*

Discussion of the effect of punishment on the offender is conspicuously absent from most writings on retribution, as is any discussion of the offender's mental state at the time of punishment. Retributivists discuss mental state and mental illness in the context of the *mens rea* of the crime in determining whether a person is morally to blame for the harm he has caused. See, *e.g.*, Moore, *supra*, at 609 ("was the accused so irrational that he cannot justly be held responsible?"). "Desert is thus at least a necessary condition of just punishment. Desert in criminal law is in turn based on a *retrospective* evaluation of the agent's behavior." Morse, Inevitable Mens Rea, 27 Harv. J. L. & Pub. Pol'y 51, 61 (2003) (emphasis added). To retributivists, the past counts and it continues to count regardless of future benefits.

Yet counsel for petitioner attempts to place the offender's mental state at the time of punishment at the center of retribution. He does not cite a single work of a single major retributive theorist in this argument. See Brief for Petitioner 45. His primary support is an article by an opponent of the death penalty who claims that retribution does not justify the death

penalty under *any* circumstances. See Gale, Retribution, Punishment, and Death, 18 U. C. Davis L. Rev. 973, 974 (1985). Gale's main thesis is that the finality of death negates its value as retribution, because it extinguishes the offender and the offender's ability to appreciate the justness of punishment at the moment the death sentence is executed. See *id.*, at 1028. Gale effectively admits that standard retribution theory does not support her thesis, and therefore she must "revise the model of retributive theory," *ibid.*, to reach her desired destination.

It is Gale's revision, not retribution as commonly understood, that places the offender's mental state at the time of punishment front and center. "Even though retribution appeals indirectly to law-abiding members of society who witness that justice was done to the offender, retribution's direct appeal is to the offender's consciousness." *Id.*, at 1031. This idiosyncratic view is the basis for the passage of the article relied on so heavily by petitioner. Gale contends that retribution "recognizes that we inflict punishment not merely to denounce criminal offenses, but to displace from our collective conscience opposing crime *and implant into the offender's conscience* the blame that justly attaches to her conduct." *Ibid.* (emphasis added, footnote omitted). Gale cites no authority for the italicized portion of the statement. The offender's conscience has little, if any, place in retribution theory. Retribution is based on moral blameworthiness, and the most blameworthy offenders are those who have no remorse and no conscience. Cf. *Brown* v. *Payton*, 544 U. S. 133, 142-143 (2005).

Gale's barely recognizable version of retribution theory culminates in a statement so preposterous that it is sufficient by itself to refute the argument leading to it. "To give someone her just deserts implies her recognition that those deserts are just." Gale, 18 U. C. Davis L. Rev., at 1031. If that were true, we could dispense with adversary sentencing proceedings altogether, and the judge would simply ask the convicted defendant what he thinks he deserves. Our prisons are full of

people who do not think their deserts are just. Obviously, society imposes the punishment that *society* thinks is just, and the defendant's opinion is irrelevant. Yet Gale's patently absurd thesis is central to defendant's argument. See Brief for Petitioner 45.

This is not to say that mental condition at the time of execution never undermines the retributive interest. In *Ford*, both the opinion of the Court and Justice Powell's concurrence refer to lack of retributive value as a reason for the common law rule. The Court, see 477 U. S., at 408, refers to a brief and unilluminating paragraph in Hazard & Louiselle, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 387 (1962). Vague references to "moral quality" and the "lesser value" of the execution of an insane person tell us little about what kind of mental illness negates the retributive value of executing the sentence. Justice Powell's discussion supports the Fifth Circuit's theory in this case. "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied." *Ford, supra*, at 422. This conclusion is based more on a survey of state practices than on a critical examination of retributive interest, however. See *id.*, at 421-422.

The connection between retribution and mental state at the time of execution, *amicus* submits, goes to the concept sometimes called "personhood" or the status of the defendant as a "moral agent," the same concepts that form the basis for allowing insanity at the time of the crime to be an excuse. See Moore, *supra*, at 595, 608. "Only people can violate expectations of what they owe each other, and only people can do wrong. Machines do not deserve praise, blame, reward or punishment." Morse, 27 Harv. J. L. & Pub. Pol'y, at 53. We generally think of people as rational agents, morally responsible for their actions. This is not true of all people however, and we would not hold an infant to blame for, *e.g.*, playing with a loaded gun and shooting someone, even if that person died as

a result. The irrationality of mental illness can warrant a similar moral exemption. See Moore, *supra*, at 595, 608.

If retribution is fundamentally backward-looking, if it is based on the principle that a person who deserves to be punished should be punished, and if the defendant's mental state at the time of the crime was such that he was morally responsible, then how can a subsequent change in mental state negate the retributive interest? That can only be possible if the change is so fundamental that the defendant is no longer the same "person" for the purpose of retribution as the one who committed the crime. It is the same house, but someone else is living there now. That could be true in some cases, but not this one. Panetti knows what he did and knows that he has been sentenced to death for the crime. See J. A. 373. His delusional belief of a conspiracy against him does not negate his moral responsibility for the crime he chose to commit and still knows he committed. Other arguments may be made for not executing a person in Panetti's condition, but lack of a retributive value in executing this judgment is not among them.

## III. Creation of a broad, vague constitutional standard for competence for execution threatens the deterrent effect of the death penalty.

In recent years, there has been a sea change in research on the deterrent effect of the death penalty. One expert testifying before Congress in 2004 summarized the developments.

> "Recent research on the relationship between capital punishment and crime has created a strong consensus among economists that capital punishment deters crime. Early studies from the 1970s and 1980s reached conflicting results. However, recent studies have exploited better data and more sophisticated statistical techniques. The modern studies have consistently shown that capital punishment has a strong deterrent effect, with each execution deterring between 3 and 18 murders. This is true even for crimes that

might seem not to be deterrable, such as crimes of passion." Shepherd, Capital Punishment and the Deterrence of Crime, Written Testimony for the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on H. R. 2934, the "Terrorist Penalties Enhancement Act of 2003" (April 21, 2004).

Abstracts and citations of deterrence studies published in peer-reviewed journals are collected at CJLF's Web site, http://www.cjlf.org/deathpenalty/DPDeterrence.htm. Among the most commonly cited studies showing a deterrent effect are Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) and Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453 (2003). As may be expected for such a controversial topic, the expert opinion is not unanimous. Tellingly, though, the authors of the two most severe criticisms have chosen to bypass the peer-review process and publish their critiques in law reviews. See Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791 (2005); Fagan, Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment, 4 Ohio St. J. Crim. L. 255 (2006).[2]

For the purpose of federal judicial review of state criminal cases, it is not necessary that deterrence be proven. It is sufficient that there be an empirical basis for the state decision-makers to believe that the penalty serves a valid penological purpose, see *Gregg* v. *Georgia*, 428 U. S. 153, 186-187 (1976) (lead opinion) (Court cannot say that the judgment of the

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2. Responses to the recent criticisms are presently in the "working paper" stage. See, *e.g.*, Mocan & Gittings, The Impact of Incentives on Human Behavior: Can We Make It Disappear? The Case of the Death Penalty, NBER Working Paper No. 12631 (Oct. 2006), available at http://www.nber.org/ papers/w12631.

Legislature is clearly wrong), and the present state of deterrence research is much more than sufficient for that standard.

The mental health *amici* recommend, as a matter of policy, that a murderer should not be executed if his mental condition "significantly impairs his or her capacity . . . to appreciate the reason for [the punishment's] imposition in the prisoner's own case . . . ." Brief for *Amici Curiae* American Psychological Association, American Psychiatric Association and Mental Alliance on Mental Illness 16. Their brief is devoid of any justification for leaping the chasm between inability and significant impairment. This proposal smacks of the American Law Institute's "substantial capacity" test for the substantive insanity defense. Cf. LaFave, *supra*, § 7.5(a), at 557-558. That test has been widely repudiated in jurisdictions that once accepted it, including the federal system. See 18 U. S. C. § 17(a) (restoring traditional inability test); Cal. Penal Code § 25(a) (same); LaFave, *supra*, § 7.2(a), at 527, n. 7. "Significant" is a broad and vague term. Such a standard would necessarily involve litigation delays in many more cases than at present, and the boundaries of what is "significant" may take many years to resolve. If the standard is deemed a constitutional one, it can only be settled with finality by decisions of this Court. Standards set by legislatures, state high courts, and federal courts of appeals would only be tentative.

Competency for execution claims are uniquely disruptive of the timely execution of a death penalty because they only become ripe when execution is imminent. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 643 (1998); cf. *Hill* v. *McDonough*, 547 U. S. __, 126 S. Ct. 2096, 2104, 165 L. Ed. 2d 44, 54 (2006) (method of execution claim may be precluded if "filed too late in the day"). Special care is therefore needed before authorizing a major expansion of this type of claim.

There is substantial reason to believe that both delays in execution and the overturning of death sentences impair the deterrent effect of capital punishment and thereby indirectly

cause the deaths of innocent people. See Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283, 314-318 (2004); Mocan & Gittings, *supra*, 46 J. L. & Econ., at 469. The fact that we cannot single out the individuals who would be saved by an effective death penalty does not make their lives any less real or any less worthy of protection. See Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2006). The deterrent effect is already too attenuated, as appeals drag on and courts defy the limits Congress has placed on their authority. See, *e.g.*, *Woodford* v. *Visciotti*, 537 U. S. 19, 20 (2002) (*per curiam*). The last thing we need is a new frontier for last-minute litigation under a broad and vague standard. There is strong reason to believe that the delays caused by such a standard would kill many innocent people.

## IV. The constitutional rule should be limited to types of insanity on which the states are agreed.

The best argument against the execution of an insane person is the oldest and simplest. "The more general concern of the common law—that executions of the insane are simply cruel—retains its vitality." *Ford* v. *Wainwright*, 477 U. S. 399, 421 (1986) (Powell, J., concurring in part and concurring in the judgment). For this reason, all states agree with the general principle. But drawing the line around what constitutes "insane" is a difficult task best left to the legislative branch in defining the legal limit and the executive branch in granting clemency in appropriate cases. The Eighth Amendment prohibits punishments that are both cruel *and* unusual in the conjunctive, and the second prong is the more readily determined. The national consensus remains limited to the one described by Justice Powell in *Ford*, *id.*, at 422, "the need to require that those who are executed know the fact of their

impending execution and the reason for it."[3] The extent of the federal constitutional rule should be limited to the extent of that consensus.

## CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*

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3. *Amicus* CJLF understands that this point will be demonstrated in the State's brief and therefore will not repeat it here.

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No. 06-6407

FEB 22 2007

IN THE

# Supreme Court of the United States

SCOTT LEWIS PANETTI,

*Petitioner,*

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are legal historians who cumulatively have more than one hundred years of experience writing, studying, and teaching legal history, including the common law of England and the laws and practices of framing-era America. Though we submit this brief in support of Mr. Panetti, our principal interest is to assist the Court in placing this case in the proper historical context. We believe the standard articulated by the Fifth Circuit governing mental competency for execution strayed from the common law approach that defines the minimum Eighth Amendment protections. In our view, executing a mentally ill defendant, such as Mr. Panetti, would have been "cruel and unusual" punishment in England during the eighteenth century as well as in the United States at the adoption of the Bill of Rights.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief, and their letters of consent are on file with the Clerk of the Court.

on the history of criminal law, and his scholarly writings include *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (1985) and *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 Mich. L. Rev. 1915 (1995). He is editor of *Studies in Legal History*, sponsored by the American Society for Legal History, and co-editor of *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* (1981) and *Twelve Good Men and True: The Criminal Trial Jury, 1200-1800* (1988).

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## SUMMARY OF THE ARGUMENT

1. This Court has held that the Eighth Amendment ban on "cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); *accord Solem v. Helm*, 463 U.S. 277, 286 (1983); *Weems v. United States*, 217 U.S. 349, 375 (1910). At the time the Bill of Rights was adopted, the common law treated execution of the mentally ill as cruel and unusual. Indeed, the English jurists who most influenced

the Founders, such as Blackstone, had denounced departures from this rule as "miserable spectacles" and "inconsistent with Humanity." Based on the historical record, the Court in *Ford* recognized that the Eighth Amendment incorporates the common law ban on executing the mentally ill.

2. The question posed in this case thus is not whether the Eighth Amendment bans execution of mentally ill defendants, but rather which defendants fall within this proscription. History reveals no precise definitions or uniform standards used at common law to determine mental competency. But it is clear what the common law did not do. It did not draw the minute distinctions the Court of Appeals demarcated below. It did not differentiate, as that Court did, between those who understood *that* they were to be executed and those who understood *why*. And it did not dissect a defendant's delusions for some tenuous link to reality permitting execution. Psychiatry, with its refined diagnostics, had yet to be born. The assessment of a defendant's fitness to be tried, convicted, or executed was broad-gauged, based on an estimation of his generalized "understanding." Reports of criminal trials suggest that courts did not engage in any systematic inquiry, but observed the behavior of the defendants. And post-verdict assessments, which appear to have more readily treated defendants as mentally ill than the assessments at trial, likewise focused on the commonly recognized and conspicuous manifestations of insanity.

Jurists and commentators also took a broad-brushed approach. To the extent they parsed the nuances of mental illness, they considered a defendant incompetent for execution if he possessed the reasoning ability of child of less than fourteen. That standard, too, is not consistent with the Court of Appeals' approach, as a child could likely have appreciated the fact of execution, even if not the reason for it.

3. If clarity as to day-to-day application of the common law ban is elusive across the span of time, it is not so as to the contemporaneous rationales for the ban. The common law was

pragmatic. The scope and application of its rules reflected their purposes. Examination of those purposes confirms that the common law, as understood at the time the Bill of Rights was adopted, would not have allowed execution of individuals based on the narrow standard adopted below.

A principal justification for the common law rule was that executing the insane did not serve the retributive purpose of the death penalty. Executions in the seventeenth and eighteenth centuries were public events, with sermons and often a penitent statement by the condemned defendant. A defendant who lacked understanding of why he was being punished, who, for example, suffered from the delusion that he was being executed "to punish him for preaching the Gospel," *Panetti v. Dretke*, 448 F.3d 815, 818 (5th Cir. 2006), would not have been a suitable participant in that morality play. More generally, as recognized then and now, retribution rings hollow when a defendant's dementia prevents him from understanding why he is being punished. As Justice Powell stated in his pivotal concurring opinion in *Ford*, the retributive function of the death penalty precludes execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422 (Powell, J., concurring).

In addition, the common law rule reflected the judgment that executing the insane did not serve the interests of deterrence. Deterrence, it was thought, required that the public identify with the condemned prisoner, that they perceive he was like them, and therefore that they could receive similar punishment for criminal acts. The more bizarre the defendant's behavior, the less the public could identify with him, or so it was believed. It is doubtful they could have seen themselves in the shoes of a defendant so delusional that he could not apprehend the reason for his execution. *See* 1 Nigel Walker, *Crime and Insanity in England* 197 (1968).

Another purpose of the common law ban on executing the mentally ill was that the incompetent could not offer reasons

why the Crown or the court should grant clemency. That would be true of a defendant who did not understand why he was being executed. On this rationale, too, the Court of Appeals' standard is inconsistent with the common law.

It was also considered cruel to execute the insane because they could not repent and seek divine forgiveness, consigning them to eternal damnation. This rationale as well would extend the common law ban to defendants like Mr. Panetti. One who did not appreciate the reasons for his punishment could not confess and repent.

In sum, the evidence regarding the application of the common law ban against executing the mentally ill, the jurists' and commentators' explication of it, and the articulated bases for it are at odds with the Court of Appeals' approach. The common law would not have permitted execution of a mentally ill defendant suffering from conspiratorial delusions regarding the reasons for his sentence. Because the Eighth Amendment, at the very least, bars those punishments considered cruel and unusual at the time of its adoption, it incorporates this broad ban. It therefore does not permit execution of Mr. Panetti.

## ARGUMENT

### I. THE EIGHTH AMENDMENT, AT A MINIMUM, BANS THOSE PUNISHMENTS THAT WERE PROHIBITED AT COMMON LAW.

As this Court has recognized, "[t]he Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason." *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983) (citing A. Nevins, *The American States During and After the Revolution* 146 (1924) and A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-07 (1968)). Mason, in turn, had "adopted verbatim the language of the English Bill of Rights." *Id.* That original ban on "cruel and unusual punishment" embodied the safeguards that the common law afforded English

subjects. *See* 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* (5th Am. ed. 1847 (from 2d London ed.)) (cruel and unusual punishment ban forbids courts from inflicting any punishment "which did not exist at common law"). As the Court has explained, the English Bill of Rights' "requirement that punishment not be 'unusuall' – that is, not contrary to 'usage' (Lat. "usus") or 'precedent' – was primarily a requirement that judges pronouncing sentence remain within the bounds of common law tradition." *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

In incorporating this language into the Eighth Amendment, the Framers thus understood that they were guaranteeing at least those protections from punishment the common law afforded English subjects. For instance, Mason, the principal Framer of the Amendment, argued that Americans ought to have the "Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity.'" *Solem*, 463 U.S. at 286 n.10 (quoting Letter to "the Committee of Merchants in London" (June 6, 1766), *reprinted in* 1 The Papers of George Mason 71 (Rutland ed. 1970)). *See also* Fairfax County Resolves (1774), *reprinted in* 1 The Papers of George Mason at 201 (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution).

Indeed, during Virginia's ratifying convention in 1788, Patrick Henry argued that Virginians should not approve the new Constitution absent a prohibition against cruel and unusual punishment like that contained in the Virginia Declaration of Rights. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* § 14.2.2.2a (Neil H. Cogan ed., 1997) (June 14, 1788 Virginia State Convention, Statement of Mr. Henry). The ban on "cruel and unusual punishment," he argued, would ensure that common law would prevail over contrary practices from France, Spain and Germany. *Id. See also* 1 J. Cont'l Cong. 83 (Ford ed., 1904) (Address to the People of

Great Britain, Oct. 21, 1774 ("[W]e claim all the benefits secured to the subject by the English constitution.")).

To be sure, Members of the Court have differed on whether "any punishment that was in common use in 1791 is forever exempt" from the limitations of the Eighth Amendment, *Furman v. Georgia*, 408 U.S. 238, 284 n.29 (1972), and whether the Court appropriately focuses on "evolving standards of decency" in setting the outer boundaries of Amendment, *see Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). But there has been little disagreement on the Constitutional floor: the ban on "cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford*, 477 U.S. at 405; *accord Solem*, 463 U.S. at 286 ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection – including the right to be free from excessive punishments."); *Weems v. United States*, 217 U.S. 349, 375 (1910) ("We may rely on the conditions which existed when the Constitution was adopted."); *accord Atkins*, 536 U.S. at 339 (Scalia, J., dissenting) (a punishment is banned by the Eighth Amendment if it is among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" (quoting *Ford*, 477 U.S. at 405)).

In *Ford*, a majority of the Court found that because common law barred execution of the insane, the Eighth Amendment can do no less. *Ford*, 477 U.S. at 417-18. The Court in *Ford* provided no precise definition of mental illness sufficient to evoke the ban, nor did it need to plumb the historical record to discern the scope of the ban under common law. But the Court's analysis of the common law was sufficient for a majority to conclude correctly that it would not allow the execution of a person who

could not properly appreciate the connection between his crime and his punishment. *Id.*

In depth analysis of the historical record confirms this conclusion. The common law did not employ the narrow approach adopted by the Fifth Circuit below, and it would not have permitted the execution of Mr. Panetti.

## II. UNDER THE COMMON LAW, MENTALLY ILL DEFENDANTS SUCH AS MR. PANETTI WERE SPARED EXECUTION.

### A. The Common Law Banned Execution of Mentally Ill Defendants as Cruel and Inhumane.

Few question that the common law as understood by the Framers banned executions of the insane. As this Court has recognized, "two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . exerted considerable influence on the Founders,"[2] and each recognized the ban. Writing in the seventeenth century, Hale was unequivocal:

> If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed . . . . [I]f such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared . . . .

1 Matthew Hale, *The History of the Pleas of the Crown* 34-35 (1736).

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[2] *Reid v. Covert*, 354 U.S. 1, 26 (1957).

Over a century later, Blackstone echoed the prohibition, calling the execution of the insane "of extreme inhumanity and cruelty":

> [I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it . . . . And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed.

4 William Blackstone, *Commentaries on the Laws of England* 24-25 (1st English ed. 1769) (citing Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 6 (1797)).[3] Thus, even if a defendant was found competent to stand trial and found guilty of a capital crime, the judge was required to grant a "reprieve" if he found that defendant to be of "nonsane memory" before execution. As Blackstone explained, a reprieve was "the withdrawing of a sentence for an interval of time; whereby the execution is suspended." 4 Blackstone, *supra* at 387. Before execution, the judge was supposed to "demand of the prisoner what he hath to allege, why execution should not be awarded against him." *Id.* at 389. It was an "invariable rule" that if the convicted person "appears to be insane, the judge in his discretion may and ought to reprieve him." *Id.* Blackstone provided an example of such a reprieve, the 1723 case of Edward Arnold, who was found competent to stand trial and convicted "for shooting at lord Onslow" but "being half a madman, was never executed, but confined in

[3] This first English edition of Blackstone's Commentaries, published in 1769, is the same as the first American edition, published in Philadelphia in 1772. Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801* 16-17 (1934).

prison, where he died about thirty years after." *Id.* at 208; *see also* John H. Langbein, *The Origins of Adversary Criminal Trial* 173-74 (2003).

Hale and Blackstone were not alone in recognizing the common law rule against executing the mentally ill. Hawles, citing Coke, wrote that "nothing is more certain Law, than that a Person who falls mad . . . after Judgment, . . . shall not be executed." John Hawles, *Remarks on the Trial of Charles Bateman, in* 4 *A Complete Collection of State-Trials and Proceedings for High-Treason and Other Crimes and Misdemeanours*, 203-06 (4th ed. 1777). Hawkins, too, reported that a defendant who became *non compos mentis* "after Conviction . . . shall not be executed." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 2 (1716). Eighteenth century legal works, published in England and the states, also discussed this proscription.[4]

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[4] 2 William Nelson, *An Abridgment of the Common Law: Being a Collection of the Principal Cases Argued and Adjudged in the Several Courts of Westminster Hall* 1141 (1726) ("[A] Man *Non compos mentis* . . . shall not lose his Life, tho' he killeth a Man."); Rev. Dr. John Trusler, *A Concise View of the Common and Statute Law of England* 261 (1781) ("If a man in sound mind commits a capital offence, and before arraignment loses his senses, he shall not be arraigned; because not able to plead in his own behalf; nay, if he becomes mad after he is found guilty, and condemned, execution shall be stayed."); 3 Matthew Bacon, *A New Abridgment of the Law, by a Gentleman of the Middle Temple* 86 (1740) ("[I]f one who has committed a Capital Offence become *Non compos* before Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed."); Richard Joseph Sullivan, *Thoughts on Martial Law, and on the Proceedings of General Courts Martial* 32 (1779) ("[A] person, who has committed a capital crime, if he becomes *non compos* before conviction [should not] be arraigned, nor, if after conviction to be executed."); 2 Timothy Cunningham, *A New and Complete Law-Dictionary* (2d ed. 1771) at "Ideots and Lunaticks" ("[I]f one who is committed for a capital offence become *non compos* before conviction, he shall not be arraigned; and if after

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So deeply rooted was the ban on executing the insane that departures evoked controversy and criticism in eighteenth century England. An oft-cited object of attack was a sixteenth century statute that permitted executions of insane persons convicted of treason:

> [I]n the bloody reign of Henry the eighth, a statute was made, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory.

4 Blackstone, *supra*, at 25. The commentators described this law as "savage and inhuman," and it was repealed as a "miserable spectacle, both against law, and of extreme inhumanity and cruelty, and [which] can be no example to others." *Id.* (citing Edward Coke); *accord* 1 Hale, *supra*, at 34-35; 1 Hawkins, *supra*, at 2.

Another departure from the ban, the trial and execution of Charles Bateman in 1685, prompted similar criticism. During his trial, Bateman "seemed to be distracted, and therefore, out of abundance of Charity, the Court appointed his Son to make his Defence for him." Hawles, *supra*, at 203, 205-06. Despite clear signs of mental illness, he was tried and executed. Citing Coke, Hawles attacked that result as offensive to the common law:

> But the Court by excusing their Favour upon that account, incurred a worse Censure; for nothing is more certain Law, than that a Person who falls mad after a Crime suppos'd to be committed, shall not

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conviction, he shall not be executed."); Giles Jacob, *A Law Grammar; or Rudiments of the Law* 15 (4th ed. 1767) ("[I]f a Traytor becomes *non Compos* before Conviction, he may not be arraigned, and if after, shall not be executed").

> be try'd for it; and if he falls mad after Judgment, he shall not be executed . . . .
>
> [T]he Law, as to this matter, when this Man was tried and executed, was as it was at common Law; and therefore if he was of *non sana Memoria*, he ought not to have been try'd, much less executed.

*Id.* at 205-06. Deviations such as the treason statute and the execution of Bateman made an impression on English jurists and lawmakers, which carried over to the Framers. Both before and after Independence, the ban on executing mentally ill defendants was reflected in the principal legal resources available to the Framers, including Blackstone's Commentaries,[5] colonial and post-Independence justice of the peace manuals,[6]

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[5] *E.g.*, Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 5 (1996) ("One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772. This edition supplied another 1400 sets at a substantially lower price; and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the Commentaries had been sold on the American as on the English side of the Atlantic." (footnotes omitted)). As some commentators have recognized, "[a]ll of our formative documents – the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall – were drafted by attorneys steeped in [Blackstone's Commentaries]." *Id* at 2 (citation and quotation marks omitted).

[6] Citing Hale and Hawkins, various editions of an influential English justice of the peace manual recited the common law rule that "[i]f one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed." *E.g.*, 2 Richard Burn, *The Justice of the Peace, and Parish Officer* 129 (1755) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); 3 Richard Burn & John Burn, *The Justice of the Peace and Parish Officer* 116 (18th ed. 1797) (same). Colonial justice of the peace manuals, often based on

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and law dictionaries, originally published in England and later reprinted in the states.[7] Ultimately, it was incorporated into the Eighth Amendment.

### B. In Determining Whether a Defendant Was Mentally Ill, the Common Law Did Not Draw the Fine Lines Delineated by the Court Below.

As noted, the common law contemplated that a defendant could be spared from execution as mentally ill, even though he previously was found competent to stand trial and criminally responsible for his actions. It follows, then, that either the standards were more lenient for determining whether the

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Burn's manuals, reflected the ban on executing the insane. *See* Richard Burn, *An Abridgment of Burn's Justice of the Peace and Parish Officer* 261 (1773) (Boston) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); Richard Starke, *The Office and Authority of a Justice of Peace* 243 (1774) (Virginia) ("If One who hath committed a capital Offence become *non compos* before Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed."). Post-independence manuals similarly reflected the ban. James Parker, *Conductor Generalis* 291 (1788) (New York) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); *The South-Carolina Justice of Peace* 329 (John F. Grimke ed., 1788) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed."); William Waller Hening, *The New Virginia Justice* 310 (1795) ("If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed.").

[7] 2 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 500 (T.E. Tomlins ed., 1811) (first American edition of Jacob's Law dictionary) (citing Hale for ban on executing those who are *non compos*); *accord* 3 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 382 (T.E. Tomlins, ed., 1811).

defendant was fit to be executed, or the law contemplated the prospect of deterioration in the defendant's mental condition between judgment and execution.

A number of factors suggest that the standards for fitness to be executed were more lenient to the defendant than the standards at trial for mental illness precluding criminal responsibility. First, the time between conviction and execution was quite short, often two weeks. Stuart Banner, *The Death Penalty: An American History* 17 (2002). Although it is possible that a defendant's mental state could deteriorate during that period, it would seem not so common an occurrence as to engender the extensive treatment in the commentaries of executing the mentally ill. Second, the determination whether to assess the defendant's mental state for purposes of staying the execution after conviction was addressed to the discretion of the Court or the Crown.[8] Third, a reprieve could be temporary, postponing execution until the defendant regained his sanity. By contrast, the stakes were higher at trial, where an acquittal based on insanity was a resolution of the defendant's criminal responsibility. Finally, commentary on the common law available at the time of the Framing and before supports the notion that the bar to executing the mentally ill required a lesser

[8] Any discretion to assess the defendant's mental state should be distinguished from discretion to grant the reprieve. Hale indicates that whether to investigate the sanity of a defendant is a left to a court's discretion. He noted, however, that "because there may be great fraud" in matters relating to the mental illness of a defendant, the judge "may do well" to impanel a jury to inquire *ex officio* of the defendant's alleged mental illness and that "it is prudence" to do so. 1 Hale, *supra*, at 35. Once the court or King determined the defendant insane, there was no discretion, and the execution had to be stayed. Specifically, Hale explained that there were three kinds of reprieves. First, *ex mandoato regis* (at king's command) was discretionary. Second, *ex arbitrio judicis* (at the judge's discretion) likewise was discretionary. Third, *ex necessitate legis* (out of necessity of law) was mandatory. 2 Hale, *supra*, at 412-13. The stay due to insanity fell within the third, mandatory category. *See* 4 Blackstone, *supra*, at 387-89; 1 Walker, *Crime*, *supra*, at 196.

showing of impairment than at earlier stages of the proceedings. For instance, Blackstone attributes the forbearance from executing Arnold for shooting at Lord Onslow to Arnold's "being *half* a madman," after a jury rejected Arnold's insanity defense and found him guilty, and after he was sentenced to death, 4 Blackstone, *supra*, at 208 (emphasis supplied); 1 Walker, *Crime*, *supra*, at 55-57. Hawles, too, suggested that the competency standard for execution had a lower threshold than for trial. In decrying the execution of Charles Bateman, Hawles noted twice that, if Bateman was mentally ill, he "ought not to have been try'd, *much less executed*," Hawles, *supra*, at 205-06 (emphasis supplied), suggesting that Hawles believed it was a greater infraction of the law to execute an insane person than to try him in the first place.

The question, therefore, is not whether a defendant like Mr. Panetti would have been acquitted on the basis of insanity at common law, but whether he would have met a less exacting standard precluding his execution. That said, divining the tests for insanity applied at any of these stages of judicial proceedings more than 200 years ago is difficult, to say the least. Clearly, though, at the time of the framing and before, courts did not have the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry. Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* 58 (1995). The common law appears to have painted insanity with a broad brush, undertaking an assessment of the manifestly delusional or irrational actions of a defendant. That is not consistent with the hairsplitting of the Fifth Circuit, which treated a defendant as sane if he understands *that* he is to be executed, regardless of whether he understands *why*.

To begin with, the contemporaneous commentaries on the common law do not support the distinction drawn by the Fifth Circuit as a test for insanity at any stage of the proceedings. Hale provided the most elaborate categorization of the types of insanity under the common law. 1 Hale, *supra*, at 29-37. He considered insanity a "defect of the understanding." *Id.* at 15.

*See also* 1 George Dale Collinson, *A Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis* 473 (1812) (equating "defect in the understanding" with "dispossession of the free and natural agency of the human mind"); Nigel Walker, *The Insanity Defense Before 1800*, 477 Annals Am. Acad. Pol. & Soc. Sci. 25, 28 (1985). Hale's influential treatise focused primarily on the mental state necessary for conviction. In that regard, he drew a distinction between total and partial insanity, noting:

> [S]ome persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences . . . .

1 Hale, *supra*, at 30. Hale noted the difficulties posed by this question:

> [I]t is very difficult to define the indivisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.

*Id.*

Hale's articulation of where to draw the line between partial insanity – which did not exonerate a defendant from a capital offense – and what Hale called "perfect . . . insanity," "absolute madness," or "total deprivation of memory" – which did – focused on a defendant's ability to "understand[]" his circumstances. *Id.* According to Hale, the "best measure" to distinguish between partial insanity and the "absolute madness" for purposes of avoiding capital punishment is that, "such a person as labouring under melancholy distempers hath yet ordinarily as great *understanding*, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." *Id.* (emphasis supplied).[9] *See also* 3 Giles Jacob, *The Law Dictionary: Explaining the Rise, Progress, and Present State, of the English Law* 383 (T.E. Tomlins ed., 1811) (first American edition of Jacob's Law dictionary, a leading

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[9] Some around the time of the framing argued that Hale's "absolute madness" reference imposed what was termed the "wild beast" standard. In the treason trial of James Hadfield (1800), John Mitford, appearing for the Crown, argued that to be acquitted because of insanity, a man "must not know what he is doing any more than an infant, . . . a brute, or a wild beast." *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 Law & Soc'y Rev. 487, 500 (1985). Commentators note that the so-called "wild beast" test is sometimes "mistakenly portrayed as requiring an insanity equivalent to a wild, raving beast." *Id.* n.11. "[T]his misunderstanding came about 'through a *misinterpretation* of [Henry de] Bracton's original use of the Latin term 'brutus,' used by him . . . to compare the insane to those who *lack reason*.'" *Id.*; *accord* Walker, *Insanity Defense*, *supra*, at 28. This is consistent with Hale's treatise. After discussing all forms of dementia that excuse guilt for capital crimes to include equating "total alienation of the mind" with having the reasoning ability of less than a fourteen-year-old, Hale concluded that persons suffering from these defects cannot be guilty of capital offenses because "they have not the use of understanding, and act not as reasonable creatures, but their actions are in effect in the condition of brutes." 1 Hale, *supra*, at 30-32. According to Hale's text, therefore, those who had the reasoning ability of that of a child less than fourteen years of age were considered to act as "brutes."

encyclopedia of the eighteenth century, adopting this same understanding of a 14-year-old standard); *accord* 1 Collinson, *supra*, at 475. Coke too adopted the 14-year-old "age of discretion" standard for determining whether a mental illness rendered a defendant a "madman" under the law. 1 Walker, *Crime*, *supra*, at 39.

It follows that the level of understanding required to meet the more forgiving standard of fitness for execution was at least that of a child less than 14 years old. As imprecise as that standard may be, it does not support the Fifth Circuit's approach. A person with the capacity of a child of 13, or even younger would likely have been capable of "awareness" that he or she was to be executed. Nonetheless, that person would not have been competent for execution under Hale's rendition of the common law standard, a rendition available to and studied by the Framers, while that person would be subject to execution under the standard adopted by the court below.

Hale's formulation and other commentaries reflect the most analytical mode of assessing competence. In practice, in London's Old Bailey and other courts, the approach appears, if anything, to have been more indefinite. Courts did not draw the fine lines the Fifth Circuit did, or seek to deconstruct the delusions of mentally ill defendants to determine whether some fragment was tethered to reality. Indeed, some cases suggest that awareness of the prospect of punishment was not an impediment to a finding of insanity.[10] The inquiry at all stages,

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[10] 1 *Select Trials for Murders, Robberies, Rapes, Sodomy, Coining, Frauds, and Other Offences; at the Sessions-House in the Old-Bailey*, 406-09, 407 (1734) (Richard Glyn told the defendant, "you must be hang'd for killing her . . . . Aye, [said the prisoner,] I know that as well as you."); *id.* at 409 ("The Jury acquitted him of the Murder, as being Lunatick at that Time."). In 1784, William Walker was tried for stabbing his wife to death. A constable discovered Walker's wife bleeding and exclaimed: "Walker, what have you done? you have killed your wife." Walker replied: "she deserved it, she used me ill, I am not sorry for it,

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including the determination of fitness for trial or execution, occurred at a higher level of generality, taking into account the general understanding and actions of the defendants.

In the trial of Elizabeth Collins in 1766, for example, the defendant was indicted for stealing. Collins's insanity was gauged not by any rigid test, but by an examination of her incoherent rambling.[11] Likewise in the 1790 trial of John Frith for throwing a stone at George III's coach, the insanity determination apparently was based principally on the defendant's bizarre responses to questioning. 1 Walker, *Crimes*, *supra*, at 223-24.[12]

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now I shall be hanged . . . ." Great Britain, Sessions (City of London and County of Middlesex), *The Whole Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London: And Also The Gaol Delivery for the County of Middlesex; Held at Justice Hall in the Old Bailey* 529-49, 537 (1783). The jury found Walker not guilty after the judge advised them that if the murder resulted from "insanity, you must then find him not guilty." *Id.* at 549.

[11] Collins reportedly stated "I want to go to the Captain . . . my husband is a gentleman; he is settled at Boston in New England. I was taken up and put into prison among all thieves . . . Justice Fielding and Mr. Welch . . . call me a mad woman: I am not mad, only I am kept from my husband . . . . Nobody knows I am here now, my Lord, but myself. I wanted to see you, and they would not let me: I went and broke the high constable's windows . . . . I may as well be dead as alive . . . If they will produce a letter that the captain does not like me, I'll agree to be hanged. He allows me a lady's income." Old Bailey Proceedings Online, Trial of Elizabeth Collins, Theft: Simple Grand Larceny May 14, 1766 (T17660514-21), http://www.oldbaileyonline.org/html_units/1760s/t17660514-21.html (last visited Feb. 21, 2007).

[12] Frith reportedly stated: "When I first arrived at Liverpool I perceived I had some powers like those which St[.] Paul had; and the sun that St[.] Paul gives a description of in the Testament: an extraordinary power that came down upon me – the power of Christ; in

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In 1756, Robert Ogle was tried for murder.[13] The defendant's state of mind at the time of the alleged crime was not at issue. But the jury, apparently without medical or other evidence concerning his competency, concluded that Ogle was "not of sound mind and memory" to stand for trial based on testimony regarding his irrational state of mind. One witness testified, "I do not think he behaved like a rational man; a rational man would have been concerned for this person he had killed; but he seemed to have no concern at all."[14] Post conviction standards, as discussed, appeared equally generalized.[15]

The common law thus did not bequeath definitive standards to determine competence for execution. What can be said is that the Framers looking to the common law would have understood the ban on executing the mentally ill as both longstanding and broad. Their sources would not have sustained a view of the law as requiring the narrow competency test

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consequence of my being persecuted and ill-used the public wanted to receive me as a most extraordinary kind of man . . . . When I went to St Thomas's church I was there surprised the hear the clergyman preach a most extraordinary sermon upon me as if I was a god . . . ." 1 Walker, *Crimes*, *supra*, at 223-24.

[13] Old Bailey Proceedings Online, Trial of Robert Ogle, Killing: Murder, June 3, 1756 (T17560603-29), http://www.oldbaileyonline.org/html_units 1750s/t17560603-29.html (last visited Feb. 21, 2007).

[14] *Id.* (William Cane testimony); *id.* ("Sometimes he has appeared as a madman, and sometimes not quite so bad.") (Arlington testimony); *id.* ("His mind changes several times a day"); *id.* ("I take him to have been a man out of his senses chief part of the time. He has very odd actions."); *id.* ("Not in his senses. I have not thought him so at all, so much as I could wish.") (Nichols testimony).

[15] Although one cannot draw firm conclusions from the *results* of the trials or proceedings as to who would be regarded as insane because juries could have disbelieved evidence of insanity or wrongly adjudged a sane person incompetent, these cases nonetheless shed some light on *how* common law judges and juries assessed the issue.

employed by the Fifth Circuit, requiring only awareness of the impending execution and not the relationship between the crime and the punishment. *Panetti*, 448 F.3d at 819. Moreover, while a Framer drawing on Blackstone, Hale, and framing-era practice might well have found the standards for competence imprecise or even amorphous, the law as generally understood then would not have allowed the execution of a mentally ill and delusional defendant like Mr. Panetti.

## III. THE FIFTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE COMMON LAW RATIONALES FOR NOT EXECUTING THE MENTALLY ILL.

Particularly given the lack of a precise, uniformly accepted definition of fitness for execution, the Court can draw "reasonable inference[s]" about the standard from the purposes of the ban. *Cf. Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004). The Court, including Justice Powell in his concurring opinion providing a majority, did just that in *Ford*. Justice Powell concluded, based on the justifications for the death penalty, that it cannot be applied to those "who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422 (Powell, J., concurring). Detailed examination of the rationales for the common law rule confirms that it would not have allowed execution of individuals who satisfied the narrow standard adopted below.

### A. Mental Illness Limited the Ability to Defend Against Execution.

A central purpose of the common law ban on executing the mentally ill was to afford the defendant the opportunity to defend his life before the sentence was carried out. *See* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 49-50 (1986); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. Rev. 381, 383 (1962). Both Hale and

Blackstone cited this rationale in their respective treatises.[16] Similarly, others explained that the law forbade such executions because:

> [A] Person of *non sana Memoria*, and a Lunatick during his Lunacy, is . . . disabled to make his just Defence. There may be Circumstances lying in his private Knowledge, which would prove his Innocency, of which he can have no Advantage, because not known to the Persons who shall take upon them his Defence.[17]

The importance of this rationale relates not to whether Mr. Panetti had an opportunity to present defenses under our current legal system. Rather, the question is whether in light of this rationale, the common law would have countenanced the Fifth Circuit's approach. The answer is no. At common law, pardons and commutations of sentences through clemency were a regular part of criminal procedure. *See* Langbein, *supra*, at 60-61, 324-25; Banner, *supra*, at 54. It was typical for prisoners to make pleas for clemency until the hour of execution. Banner, *supra*, at 41. If condemned prisoners were to have any hope of avoiding death, they could not do or say anything that may reflect anything less than good character. *Id.* Hale and Blackstone recognized that persons of non sane memory, like Mr. Panetti, cannot plead effectively for clemency, and thus should not be executed. More specifically, a defendant who believed the "State's real motivation is to punish him for preaching the Gospel," *Panetti*, 448 F.3d at 818, could not properly have made the case for mercy. The Fifth Circuit's distinction thus is not consistent with

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[16] *See* 4 Blackstone, *supra*, at 24-25 ("[I]f, after judgment, he becomes of nonsane memory; execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution"); 1 Hale, *supra*, at 35 ("for were he of sound memory, he might allege somewhat in stay of judgment or execution").

[17] Hawles, *supra*, at 205.

this rationale for the common law rule, and the rule would not have permitted execution under the circumstances here.

### B. Execution of the Insane Did Not Satisfy Society's Retributive Interests.

The common law saw retribution as a central purpose of capital punishment. Banner, *supra*, at 23; Ward, *supra*, at 54-56; Hazard & Louisell, *supra*, at 386-87. This purpose required that a morally guilty offender suffer punishment of equal quality to the wrong he committed. *See* Banner, *supra*, at 14; Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 386-87. The common law rule reflected an understanding that executing a mentally ill person exacted a punishment of lesser value than executing a sane person. *See* Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 387. In balancing punishment and crime, the measured quality of the punishment included the criminal's suffering in anticipation of death. *See* Ward, *supra*, at 54; Hazard & Louisell, *supra*, at 387. Coke and others who helped shape the English common law shared this view. *See* 1 Walker, *Crimes*, *supra*, at 197. If the condemned criminal could not understand and appreciate why he was being executed, he could not satisfy the social impetus for punishment equal to the crime.

In addition, the theory of retribution at common law went beyond merely punishing the individual criminal, but also involved teaching a moral lesson to the community as a whole. Because the cause of crime in the eighteenth century was thought to be the failure to control a natural human tendency toward evil, "failure to punish the crime would spread the criminal's guilt to the entire community." Banner, *supra*, at 23. Executions, therefore, were public spectacles, complete with sermons and frequently lengthy confessions by the condemned criminals. *Id.* at 13-16, 31-32. It was crucial to this aspect of retribution that the community identify with the criminal. Banner, *supra*, at 32; *see also* Hazard & Louisell, *supra*, at 387. Given the mores of the time, the community could not identify with a mentally ill, delusional criminal sufficiently to satisfy this

purpose. *See* Walker, *Crimes*, *supra*, at 197; *see also* Hazard & Louisell, *supra*, at 387; Banner, *supra*, at 32. John Locke, who cited Hale and Hawkins when explaining why *non compos* defendants were not executed for capital crimes, elaborated on this point:

> Rewards and punishments are evidently instituted for the benefit of society, for the encouragement of virtue, or suppression of vice, in the object thus rewarded or punished, and in the rest of the community; but what tendency to the above purposes can either of these have, if dispensed to one who is not so far himself as to become conscious of having done anything to deserve it? What instruction is conveyed to him? What admonition to such others, as are duly acquainted with the whole of the case, and see every circumstance thus grossly misapplied?[18]

The Fifth Circuit's "awareness" standard is not consistent with this rationale. As Justice Powell concluded in *Ford*, "one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." 477 U.S. at 421 (Powell, J., concurring). The Fifth Circuit dispenses with half of the required understanding.

### C. Executing the Mentally Ill Did Not Serve the Deterrent Function of Capital Punishment.

Deterrence was a key rationale for the death penalty at common law, *see* Banner, *supra*, at 23, and it had much in common with the retributive rationale. However, while retribution was retrospective, focused on punishment of the offender, deterrence was prospective, focused on preventing future crimes. As with retribution, however, it was widely accepted at common law that the public must identify with the

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[18] 2 John Locke, *An Essay Concerning Human Understanding* 304, 306-07 (19th ed. 1793).

condemned prisoner for his execution to have a deterrent effect on others. *See* Walker, *Crime*, *supra*, at 197; Hazard & Louisell, *supra*, at 384 & n.13 (noting that "Coke has it that taking the human life of an insane person does not serve as an example to others"). Common law scholars believed that these punishments would not deter criminal behavior. William Nelson explained that "while [a defendant] is Lunatick, he is *Demens*, and 'tis his Madness and not his Intention, which is the Cause of the Action; and for that Reason his Punishment could not be an Example to others." 2 William Nelson, *An Abridgment of the Common Law: Being a Collection of the Principal Cases Argued and Adjudged In the Several Courts of Westminster Hall* 1141 (1726). Giles Jacob wrote that "the Punishment of a Lunatick without his Mind and Discretion, [cannot] be an Example to others." Giles Jacob, *A Law Grammar; or Rudiments of the Law* 88 (4th ed. 1767).

Although Hawles noted that, with capital punishment, the "Terror for the Living is equal, whether the Person be mad or in his Senses," Hawles, *supra*, at 205, he argued that if "the King is . . . no otherwise benefited by the Destruction of his Subjects, than that the Example deters others from committing the like Crimes; and there being so many to be made examples of, besides those on whom the Misfortunes of Madness fall, it is inconsistent with Humanity to make Examples of them." *Id.* at 206. Indeed, this reasoning from the common law era suggests that executing the mentally ill could generate more pity for the criminal than fear of punishment among the general public, thus weakening the deterrent effect of the death penalty. Hazard & Louisell, *supra*, at 384-85. This would be true even if the defendant was "aware" that he was to be executed, so long as his mental illness was sufficiently pronounced to set him apart from the populace. Thus, the deterrence rationale for the ban on execution of the mentally ill also indicates that the common law would not have drawn a distinction resulting in execution of someone who did not understand why he was being punished.

### D. Execution of the Mentally Ill Deprived the Condemned Criminal of the Opportunity to Make Peace with God.

In the seventeenth and eighteenth centuries, capital punishment was understood to facilitate a criminal's repentance. Banner, *supra*, at 16. Because repentance before death was generally thought indispensable to salvation, *id.* at 23, common law practitioners considered it "inconsistent with Religion, as being against Christian Charity to send a great Offender quick, as it is stil'd, into another World, when he is not of a capacity to fit himself for it." Hawles, *supra*, at 206. As noted, at the time of the framing, there was frequently a short period – generally no longer than two weeks – between conviction and execution, to allow the prisoner to prepare for death and, in particular, to repent. Banner, *supra*, at 17. Ministers, among others, regularly visited condemned prisoners. *Id.* at 18-19. True repentance, however, required a criminal to acknowledge his crimes. *Id.* at 20.

The repentance envisioned by the common law would have been impossible for a person such as Mr. Panetti, whose mental illness causes delusions that he is being "persecuted for his religious activities and beliefs," *Panetti*, 448 F.3d at 817 (citation omitted), rather than being punished for his wrongdoing. Given this rationale, it would have been regarded at common law as inhumane to execute such a defendant.

## CONCLUSION

The common law ban on execution of the mentally ill, which sets the floor for Eighth Amendment protections, would not have embraced the approach of the Court below or permitted execution of Mr. Panetti. The judgment therefore should be reversed.

Respectfully submitted,

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